Volume 8, No. 12, Pages 3871 to 4018, May 31 - June 11, 1993

FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

***James H. Quello, Chairman**

****Sherrie P. Marshall**

Andrew C. Barrett

Ervin S. Duggan

The contents of this document are subject to correction by means of an erratum appearing at a future date in the FCC Record. Users should notify the Secretary of errors so that an erratum can be inserted in a later publication.

The appropriate citation for documents printed in the FCC Record should include the volume number, page number, and year. See 47 C.F.R. §1.14. Earlier Commission documents may continue to be cited to the FCC Reports.

Citation Form: 8 FCC Rcd 1 (1993)

*Commissioner Quello designated as Chairman effective February 5, 1993.
**Commissioner Marshall resigned effective April 30, 1993.

United States Government Printing Office • Washington, D.C.

For Sale by the Superintendent of Documents, U.S. Government Printing Office on a subscription basis

Federal Communications Commission Record

Volume 8
Issue 12

Table of Contents

Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... iii

Table of Docket Numbers..... iv

Table of Rulemaking Numbers..... v

Table of Localities..... vi

Table by Subject Matter..... vii

Table by Statutory and Rule Provisions..... x

Decisions, Reports, Memorandum Opinions, Orders, and Other Selected Material..... 3871

Table of Cases
Volume 8
Issue 12

Case Name	Page
ALLTEL Service Corporation	3876
AT&T Communications	3924
Affinity Network Incorporated	3894
Alcatel Network Systems	3946
Alltel Service Corporation	4005
Alpha-Omega Broadcasting of Albuquerque, Inc.	3970
Amendment of Part 15 - Restricted Bands of Operation	3871
Amendment of Part 90 - Development of SMR Systems	3950
Amendment of Part 90 - Extended Implementation Periods	3975
Amendment of Part 90 - Secondary Fixed Operations	3979
Amendment of Parts 2 and 90 - Use of Channels in SMR Service	3974
American Telephone and Telegraph Co.	3901
Amery Telephone Company	4003
Asterisk Communications, Inc.	3933
BellSouth Telecommunications, Inc.	3948
Broadcap of Florida, Inc.	3893
Business WATS, Inc.	3928
Cable TV Act of 1992 - Broadcast Signal Carriage Issues	3938
Call Sign Administrators	3947
Cellular Data, Inc.	3920
Central Virginia Educational Telecommunications Corporation	3969
Detariffing of Customer Premises Equipment and Enhanced Services	3891
Dick Broadcasting Company, Inc.	3897
East Bernard Independent School District	4000
Gaines, Bennett Gilbert	3986
Great Lakes Broadcasting, Inc.	4007
Hawaii Public Safety Plan	4014
Idaho Public Safety Plan	3972
Lights of America	3922
MDS Media Systems	3874
Maui Adventist School	3994
McFaddin Independent School District	3998
Mississippi Authority for Educational Television	3971
Moenkopi Communications, Inc.	3990
Multichannel Media, Inc.	3992
National Association of Regulatory Utility Commissioners	3877
New Mexico Public Safety Plan	4018
North Carolina Public Safety Plan	3973
North Dakota Public Safety Plan	4015
Pacific Bell and Nevada Bell	3982
PanAmSat, L.P.	3905
Root, Chapman S.	3937

Case Name	Page
Rule Waiver of 14-day Notice Requirement	3927
Rullman, Sherry	4012
Schurz Communications, Inc. v. FCC	3941
South Carolina Public Safety Plan	4016
Table of Allotments, FM, Amite, LA	3912
Table of Allotments, FM, Anchorage, AK	3880
Table of Allotments, FM, Boonville and Columbia, MO	3878
Table of Allotments, FM, Dublin and Marlin, TX	3914
Table of Allotments, FM, Hastings, NE	3884
Table of Allotments, FM, Huntingdon, TN	3918
Table of Allotments, FM, Key Largo and Key Colony Beach, FL	3886
Table of Allotments, FM, Lahoma, OK	3882
Table of Allotments, FM, Miami, FL	3916
Table of Allotments, FM, Three Lakes, Newbold and Nakoosa, WI	3889
Table of Allotments, FM, Volcano, HI	3910
Tariff Filings Made on 14 days' Notice	3949
The Rex Company	3988
The Time Machine, Inc.	4002
Time Warner Entertainment Company, L.P.	4006
Univision Holdings, Inc.	3931
WNYC Communications Group	3925
Wayne School District	3996
West Virginia Public Safety Plan	4011
Wisconsin Public Safety Plan	4017

Federal Communications Commission Record

Table of Cases by Delegated Authority and FCC Number
Volume 8
Issue 12

Delegated Authority or FCC Number	Page
DA 93 - 493	3878
DA 93 - 527	3916
DA 93 - 528	3918
DA 93 - 529	3880
DA 93 - 530	3882
DA 93 - 531	3884
DA 93 - 532	3886
DA 93 - 533	3889
DA 93 - 581	3876
DA 93 - 583	3910
DA 93 - 584	3912
DA 93 - 587	3982
DA 93 - 589	3925
DA 93 - 593	3914
DA 93 - 594	3874
DA 93 - 595	3901
DA 93 - 597	3877
DA 93 - 598	3972
DA 93 - 599	3973
DA 93 - 603	3946
DA 93 - 605	3924
DA 93 - 606	3928
DA 93 - 607	3894
DA 93 - 608	3949
DA 93 - 609	3948
DA 93 - 610	3922
DA 93 - 611	3947
DA 93 - 613	3969
DA 93 - 614	3970
DA 93 - 615	3971
DA 93 - 617	4002
DA 93 - 618	4003
DA 93 - 628	4011
DA 93 - 629	4014
DA 93 - 630	4015
DA 93 - 631	4016
DA 93 - 632	4017
DA 93 - 633	4018
DA 93 - 636	3992
DA 93 - 641	4005
DA 93 - 648	4006
FCC 93 - 50	3941
FCC 93 - 71	3927
FCC 93 - 237	3891
FCC 93 - 244	3905
FCC 93 - 245	3920
FCC 93 - 256	3975
FCC 93 - 257	3950
FCC 93 - 260	3871
FCC 93 - 262	3979
FCC 93 - 263	4007
FCC 93 - 271	3893
FCC 93 - 272	3988
FCC 93 - 273	3990
FCC 93 - 275	3897
FCC 93 - 276	3933
FCC 93 - 277	3931
FCC 93 - 278	3938
FCC 93 - 279	3974
FCC 93 - 280	3937
FCC 93 - 281	3994
FCC 93 - 283	4012
FCC 93 - 286	3996
FCC 93 - 287	3998
FCC 93 - 288	4000
FCC 93R - 25	3986

Table of Cases by Docket Number
Volume 8
Issue 12

Docket Number				Page
CC	Dkt.No.81	-	893	3891
CC	Dkt.No.88	-	2	3982
CC	Dkt.No.88	-	2	3948
CC	Dkt.No.90	-	623	3982
ET	Dkt.No.92	-	9	3946
ET	Dkt.No.92	-	165	3871
MM	Dkt.No.88	-	86	4007
MM	Dkt.No.89	-	128	3914
MM	Dkt.No.90	-	125	3986
MM	Dkt.No.91	-	135	3878
MM	Dkt.No.91	-	248	3918
MM	Dkt.No.91	-	318	3889
MM	Dkt.No.92	-	259	3938
MM	Dkt.No.93	-	136	3886
MM	Dkt.No.93	-	137	3884
MM	Dkt.No.93	-	138	3882
MM	Dkt.No.93	-	139	3880
MM	Dkt.No.93	-	140	3916
MM	Dkt.No.93	-	147	3910
MM	Dkt.No.93	-	148	3912
MM	Dkt.No.93	-	151	3988
MM	Dkt.No.93	-	152	3990
PR	Dkt.No.89	-	553	3974
PR	Dkt.No.91	-	66	3979
PR	Dkt.No.92	-	210	3975
PR	Dkt.No.92	-	273	4017
PR	Dkt.No.93	-	77	4015
PR	Dkt.No.93	-	78	4016
PR	Dkt.No.93	-	79	4011
PR	Dkt.No.93	-	80	4014
PR	Dkt.No.93	-	86	4018
PR	Dkt.No.93	-	114	3950

Table of Cases by Rulemaking Number

Volume 8
Issue 12

Rulemaking Number	Page
RM - 6724	3974
RM - 6955	3914
RM - 6996	3914
RM - 7697	3878
RM - 7778	3918
RM - 7853	3889
RM - 7871	3920
RM - 7889	3889
RM - 7890	3889
RM - 7974	3975
RM - 8029	3950
RM - 8030	3950
RM - 8117	3950
RM - 8161	3886
RM - 8169	3916
RM - 8211	3880
RM - 8225	3882
RM - 8227	3884
RM - 8232	3910
RM - 8236	3912

Table of Cases by City
Volume 8
Issue 12

City/ State	Page
Amite, LA	3912
Anchorage, AK	3880
Asheboro, NC	3897
Atlanta, GA	3938
Baltimore, MD	3986
Beaumont, TX	3992
Bisbee, AZ	3988
Boonville, MO	3878
Chalmers, TX	4000
Columbia, MO	3878
Dublin, TX	3914
Dunnellon, FL	3933
Hastings, NE	3884
Huntingdon, TN	3918
Huron, OH	4007
Key Colony Beach, FL	3886
Key Largo, FL	3886
Lahoma, OK	3882
Lakeland, FL	3937
Lindsay, OK	3996
Marathon, FL	3886
Marlin, TX	3914
Miami, FL	3916
Moab, UT	3990
Nakoosa, WI	3889
New York, NY	3925
Newbold, WI	3889
Pocatello, ID	4012
Port Edwards, WI	3889
Puunene, HI	3994
Sandusky, OH	3874
Temple Terrace, FL	3893
Three Lakes, WI	3889
Victoria, TX	3998
Volcano, HI	3910
Walnut, CA	3922

Subject	Page
Adjudication	
Administrative Law Judge Decision	
Integration of ownership into management, qualitative aspect	4007
Reopening of record	4007
Site availability or suitability	4007
Orders or Notices	
Lottery to select licensee	3988, 3990
Amateur Radio Service (ARS)	
ARS - Licenses, examinations for operators'	
Grading of examination	3947
Broadcast Radio Services - General Rules	
Applications	
Renewal/assignment/transfer, amendment to applications for	3897
Changes, renewals in existing stations	
Assignment or transfer of control, application for voluntary	3931
Operating hours	
Discontinuation	3988, 3990
Schedule	3988, 3990
Policies of the FCC	
Character evaluation of broadcast applicants	3931
Records kept by stations	
Equal employment opportunity program	3897, 3933
Broadcasting - FM Stations	
Allotments and assignments	
Allotments, table of	3878, 3880, 3882, 3884 3886, 3889, 3916, 3914 3912, 3910, 3918
Cable Television Service	
Markets and services	
Cable signals in major markets, provisions for	3969, 3970, 3971
Cable signals in smaller markets,provisions for	3938, 3938
Carriage of TV stations by qualified cable systems, mandatory	3925
Expiration of mandatory carriage provisions	3938
Qualified television station, method to determine a	3925, 3938
Network nonduplication protection	
Signals, priority of	3938

Subject	Page
Carriers: Service Altered	
Cable television video programming facilities	
Video programming facilities by telephone common carriers	4006
Waiver to 63.54 and 63.55	4006
Commission Organization	
Delegations of authority - Chief, Common Carrier Bureau	
Limitations on delegated authority	3876, 3924, 4012
Communications Act of 1934	
Penal provisions; forfeitures	
Rebates and offsets, forfeitures in cases of	3897
Procedural and Administrative provisions	
Reconsiderations of actions taken by Commission	3897
Radio, provisions relating to	
Applications;form of and conditions attached to	3905, 3897, 3933, 3988 3990
Construction permits	3905
Licenses and conditions for foreign communication, applications	3905
Domestic Public Fixed Radio Services	
Applications and licenses, filing requirements	
Defective applications	3874
Technical content of applications	3874
Applications and licenses, processing	
Dismissal and return	3874
Grants by random selection	4012
Mutually exclusive applications	4012
Opposition to applications	3992
Multipoint distribution service	
Frequency interference	3874
Equipment: Industrial, Scientific and Medical	
Technical standards	
Conduction limits for particular equipment, tables of	3922
Frequency Allocations and Radio Treaty Matters	
Equipment authorization procedures: certification	
Changes in equipment requiring certification, permitted	3922
Equipment authorization procedures: conditions on grants	
Grantee for facts regarding equipment, responsibility of	3922

Subject	Page
Practice and Procedure	
Common carriers: complaints	
Formal or informal	3894
Common carriers: complaints, formal	
Answers to complaints	3928
Supplemental complaints	3928, 3894
Mass media services: random selection	
Preference factors (.1621) in random selection, incorporation of	3992
Probability calculation	3992
Proceedings, miscellaneous	
Forfeiture proceedings	3897, 3933
Reconsideration/review of Commission action	
Actions by delegated authority	3893
Actions by delegated authority, application for review of	4012
Reconsideration of a final FCC action, petition for	3897, 3931, 3986
Private Land Mobile Radio Services	
Licensing/use of frequencies in 806-821, 851-866 MHz bands	
Loading requirements for trunked systems	3974
Radio Frequency Devices	
Lowpower specific devices: control and security alarms	
Technical standards	3871
Special Broadcast Services	
Instructional TV fixed service	
Applications, selective procedures for mutually exclusive	3996, 3994
Licensing requirements and eligibility factors	3996, 3994
Services permissible and educational purposes	3996, 3994, 4000

TABLE OF STATUTORY AND RULE PROVISIONS

Page

000.291 Authority delegated 4012
000.291 Delegated Authority 3876
000.291 Delegated Authority 3924
001.080 Forfeiture proceedings 3933
001.080 Forfeiture Provisions 3897
001.106 Petition for Reconsideration, Denied 3986
001.106 Petitions for Reconsideration 3897
001.106 PETITIONS FOR RECONSIDERATION 3931
001.115 Application for review of action taken pursuant to d 4012
001.117, Review on Commission's Own Motion 3893
001.1622 Preferences 3992
001.1623 Probability calculation 3992
001.711 Formal or Informal Complaints 3894
001.727 Motions 3894
001.727 Motions 3928
001.730 Other forms of discovery 3928
002.1043 Changes to existing licensed equipment 3922
002.106. Table of Frequency Allocations. 3920
002.931 Conformance with specified standards 3922
015.205(a) 3871
018.307 Limitations on RF voltage 3922
021.015(a) Technical content of applications 3874
021.020(d) Defective applications 3874
021.028(d) Dismissal and return of applications 3874
021.300 Opposition to application 3992
021.310 Mutually exclusive applications 4012
021.330 (a) Grants by random selection 4012
021.901(d)(5) MMDS statistical area rule 4012
021.902(i) Frequency interference 3874
061.058 Notice Requirements 3949
061.580 Notice Requirements 3927
073.1740 Minimum Operating Schedule 3990
073.1740 Minumum Operating Schedule 3988
073.1750 Discontinuance of Operation 3988
073.1750 Discontinuance of Operation 3990
073.202 FM Table of Allotments 3878
073.202 FM Table of Allotments 3880
073.202 FM Table of Allotments 3886
073.202 FM Table of Allotments 3889
073.202 FM Table of Allotments 3910
073.202 FM Table of Allotments 3912
073.202 FM Table of Allotments 3914
073.202 FM Table of Allotments 3916
073.202 FM Table of Allotments 3918
073.202 FM Table of Allotments 3882
073.202 FM Table of Allotments 3884
073.2080 Equal Employment Opportunities 3897
073.2080 Equal employment opportunities 3933
073.3540 APPLICATION FOR VOLUNTARY ASSIGNMENT OR TRANSFER OF 3931

073.3584 Petitions to Deny 3897
073.4280 CHARACTER EVALUATION OF BROADCAST APPLICANTS 3931
073.659 TV network financial interests and syndication right 3941
074.913 - SELECTION PROCEDURE FOR MX ITFS APPLICATIONS 4000
074.913 SELECTION PROCEDURE FOR MUTUALLY EXCLUSIVE ITFS APP. 3998
074.913 Selection Procedure for Mutually Exclusive ITFS Appl 3994
074.913 Selection procedure for mutually exclusive ITFS Appl 3996
074.931 - PURPOSE AND PERMISSIBLE SERVICE 4000
074.931 Purpose and Permissible Service 3994
074.931 Purpose and Permissible service 3996
074.932 - ELIGIBILITY AND LICENSING REQUIREMENTS 4000
074.932 Eligibility and Licensing Requirements 3994
074.932 Eligibility and licensing requirements 3996
074.932 ELIGIBILITY AND LICENSING REQUIREMENTS 3998
075.500 Definitions 3938
075.510 Major television markets 3938
076.061(b) Complaints regarding qualified NCE Stations 3969
076.061(b) Complaints regarding qualified NCE stations 3970
076.061(b) Complaints regarding qualified NCE stations 3971
076.300 Scope of applications 3938
076.302 Required record keeping for must-carry purposes 3938
076.550 Definitions applicable to the must-carry rules 3925
076.550 Definitions applicable to the must-carry rules 3938
076.560 Signal carriage obligations 3925
076.560 Signal carriage obligations 3938
076.570 Channel positioning 3938
076.580 Notification 3938
076.590 Modification of television markets 3938
076.600 Compensation for carriage 3938
076.610 Disputes concerning carriage 3938
076.620 Manner of carriage 3938
076.640 Retransmission consent 3938
076.700 Special relief and must-carry complaints 3938
076.920 Network non-duplication; extent of protection 3938
090.007 Definitions 3950
090.135 Modification of License 3950
090.159 Temporary and Conditional permits 3950
090.261 Assignment and use of frequencies in the band 450-45 3979
090.629 Extended implementation period 3975
090.631 Trunked systems loading, construction and authorizat 3975
090.631(f) Trunked systems loading, construction and authori 3974
097.029 Club and military recreation station call sign admin 3947
300.308 Applications for Licenses; Condition in Licens Forei 3905
300.309 Action upon Application 3988
300.309 Action upon Application 3990
300.309 Action Upon Applications 3897
300.309 Action Upon Applications 3933
300.309 Action Upon Applications Form & Conditions Attached 3905
300.319 Construction Permits 3905
300.405 Reconsiderations 3897
300.503 Forfeiture in Cases of Rebates and Offsets 3897
300.504 Provisions Relating to Forfeitures 3897
300.535 Carriage of noncommercial educational television 3925
300.615 Carriage of Noncommercial Educational Television 3969

300.615 Carriage of Noncommercial Educational Television 3970
300.615 Carriage of Noncommercial Educational Television 3971
343.510 Contracts and Concessions 3901
364.1001 International Settlements Policy & Waivers 3901
47 CFR 0.91. 0.291 3982
47 CFR Section 64.702, Furnishing of Enhanced Services & CPE 3948
47 CFR §64.703 Furnishing OFCPE and Enhanced Services 3891
500.100 HDO 3988
500.100 HDO 3990
500.3005 integration ownership into management 4007
500.3025 local residence 4007
500.3180 site availability 4007
500.3200 reopening of record 4007
500.503 Forfeitures in Cases of Rebates and Offsets 3933
DA93-597; AAD93-44 3877
DA93-641; AAD93-51 4005
FM Broadcast Stations, Amite, Louisiana 3912

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 92-165

In the Matter of

Revision of Part 15
of the Rules to Expand
the Restricted Bands of
Operation

REPORT AND ORDER

Adopted: May 13, 1993; Released: June 1, 1993

By the Commission:

INTRODUCTION

1. By this action, the Commission amends Part 15 of its rules to prohibit the operation of low power, non-licensed radio transmitters and to limit spurious emissions from such devices within the frequency bands that have been authorized for the Global Maritime Distress and Safety System (GMDSS).

BACKGROUND

2. The Commission's rules restrict Part 15 low power, non-licensed radio frequency (RF) transmitters, *i.e.* intentional radiators, from operating in certain frequency bands.[1] These "restricted bands" were established to protect against interference to services involving safety-of-life and services that use very low received signal levels. The GMDSS is an international automated maritime distress alerting system that relies on satellite and advanced terrestrial systems. The GMDSS is used for worldwide safety alerts, coordinated search and rescue operations and the dissemination of maritime safety information. On January 16, 1992, the Commission adopted a *Report and Order* incorporating GMDSS requirements into its Maritime Services Rules.[2]

3. The GMDSS frequency bands are used for safety-of-life purposes and, therefore, meet the criteria for protection as restricted frequency bands under Part 15. In addition, the international Radio Regulations require that transmissions on the GMDSS bands be protected from other interfering sources of radio frequency emissions.[3] In view of the potential for low power, non-licensed transmitters to interfere with GMDSS operations on these bands, the Commission adopted a *Notice of Proposed Rule Making* (*Notice)* proposing to expand the Part 15 restricted bands to include the ship-to-shore GMDSS frequencies required to be protected by the international Radio Regulations.[4] The Commission also proposed to reduce the width of the existing restricted frequency band of 490-510 kHz to 495-505 kHz, effective February 1, 1999.[5]

4. The United States Coast Guard was the only party to file comments in response to the *Notice*. The Coast Guard asks that ten additional restricted bands be added to protect shore-to-ship GMDSS communications.[6] The Coast Guard suggests that Part 15 intentional radiators that may operate on these bands, such as security alarm, data, and computer communications systems, are likely to proliferate on vessels. According to the Coast Guard, this could result in harmful interference that could only delay or prevent the reception of a distress alert relay.

DISCUSSION

5. The proposed new restricted bands were limited to the GMDSS bands requiring protection under international radio regulations. In developing that proposal, we considered including additional GMDSS-related frequencies in the Part 15 restricted bands. However, we believed that to do so would unnecessarily restrict Part 15 intentional radiators from frequencies on which there is little likelihood of interference. We would not expect Part 15 intentional radiators, such as security alarms, to be commonly used on ships. Furthermore, we note that the Captain of a vessel may restrict or prohibit the operation of any transmitter on board, including Part 15 intentional radiators. Accordingly, we conclude that the shore-to-ship frequencies should not be added to the restricted bands in Section 15.205.[7]

---

[1] *See* 47 CFR Section 15.205. Part 15 transmitters may not operate within the restricted frequency bands. Spurious emissions falling within the restricted frequency bands must not exceed the general radiated emission limits in 47 CFR Section 15.209.

[2] *See Report and Order*, PR Docket No 90-480, 7 FCC Rcd 951 (1992).

[3] *See* ITU Radio Regulations, RRN38-11, Section 44, N 3067 Mob-87, 1990. As stated therein, any emission capable of causing harmful interference to transmissions on certain GMDSS frequency bands used for distress, alarm, urgency or safety communications is prohibited. For other GMDSS frequency bands, the ITU regulations state only that emissions causing harmful interference are prohibited.

[4] *See Notice of Proposed Rule Making* in ET Docket No. 92-165, adopted July 22, 1992, 7 FCC Rcd 5174 (1992). Specifically, we proposed to add the following restricted bands: 4123.5-4126.5 kHz, 4177.25-4177.75 kHz, 4207.25-4207.75 kHz, 6213.5-6216.5 kHz, 6267.75-6268.25 kHz, 6311.75-6312.25 kHz, 8289.5-8292.5 kHz, 8376.25-8386.75 kHz, 8414.25-8414.75 kHz, 12.2885-12.2915 kHz, 12.51975-12.52025 MHz, 12.57675-12.57725 MHz, 16.4185-16.4215 MHz, 16.69475-16.69525 MHz, 16.80425-16.80475 MHz, 156.52475-156.52525 MHz, and 1645.5-1646.5 MHz.

[5] This restricted band provides interference protection to the maritime distress frequency 500 KHz. The guard bands for that frequency are scheduled to be reduced when the GMDSS is fully implemented on February 1, 1999. *See* 47 CFR 2.106 Footnote 471.

[6] The Coast Guard request that the following frequencies be added: 517.75-518.25 kHz, 4209.25-4209.75 kHz, 4209.75-4210.25 kHz, 6313.75-6314.25 kHz, 8416.25-8416.75 kHz, 1.257875-1.257925 MHz, 1.680625-1.680675 MHz, 1.968025-1.968075 MHz, 2.237575-2.237625 MHz, 2.610025-2.610075 MHz.

[7] The Coast Guard, in its comments, points out that five frequency bands that involve the use of single-sideband communications were incorrectly specified in the *Notice*. The proposed frequency bands were: 4123.5-4126.5 kHz, 6213.5-6216.5 kHz,

6. We believe that the addition of the proposed new restricted frequency bands will have little, if any, impact on manufacturers of Part 15 transmitters. These frequencies do not appear to be in use by any current Part 15 devices. We note the absence of any comments or objections from equipment manufacturers. We observe that the addition of these restricted frequency bands will further ensure the reliability of the GMDSS. Therefore, we find that the new restricted frequency bands are in the public interest and we are amending Section 15.205 of our rules accordingly.

PROCEDURAL MATTERS

7. *Final Regulatory Analysis.* Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final Analysis is as follows:

I. Need and purpose of this action:

The rule changes adopted in this Report and Order are needed to protect frequency bands used by the Global Maritime Distress and Safety System (GMDSS) from harmful interference, in accordance with international Radio Regulations.

II. Summary of the issues raised by the public comments in response to the Initial Regulatory Flexible Analysis:

There were no comments submitted in response to the Initial Regulatory Flexible Analysis.

III. Significant alternatives considered:

The Commission has considered the alternatives presented in this proceeding and has adopted standards that do not unduly burden the industry, but still provide adequate protection to the GMDSS frequencies.

ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended. Part 15 of the Commissions Rules and Regulations IS AMENDED as set forth in the Appendix below. These Rules and Regulations are effective [30 days after publication in the Federal Register], IT IS FURTHER ORDERED THAT this proceeding IS TERMINATED.

9. For further information on this proceeding, contact Errol Chang, Technical Standards Branch, Office of Engineering and Technology, telephone 202-653-7316.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Title 47 of the Code of Federal Regulations, Part 15 is amended as follows:

Part 15 - Radio frequency devices

1. The authority citation for Part 15 continues to read as follows:

AUTHORITY: Sections 4, 302, 303, 304, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303, 304, and 307.

2. Section 15.205 is amended by revising paragraph (a) to read as follows:

Section 15.205 Restricted bands of operation.

(a) Except as shown in paragraph (d) of this section, only spurious emissions are permitted in any of the frequency bands listed below:

8289.5-8292.5 kHz, 12.2885-12.2915 MHz, and 16.4185-16.4215 MHz. We are correcting these bands per the Coast Guard's suggestion.

MHz	MHz	MHz	GHz
0.090 - 0.110	16.42 - 16.423	399.9 - 410	4.5 - 5.25
0.495 - 0.505[1]	16.69475 - 16.69525	608 - 614	5.35 - 5.46
2.1735 - 2.1905	16.80425 - 16.80475	960 - 1240	7.25 - 7.75
4.125 - 4.128	25.5 - 25.67	1300 - 1427	8.025 - 8.5
4.17725 - 4.17775	37.5 - 38.25	1435 - 1626.5	9.0 - 9.2
4.20725 - 4.20775	73 - 74.6	1645.5 - 1646.5	9.3 - 9.5
6.215 - 6.218	74.8 - 75.2	1660 - 1710	10.6 - 12.7
6.26775 - 6.26825	108 - 121.94	1718.8 - 1722.2	13.25 - 13.4
6.31175 - 6.31225	123 - 138	2200 - 2300	14.47 - 14.5
8.291 - 8.294	149.9 - 150.05	2310 - 2390	15.35 - 16.2
8.362 - 8.366	156.52475 - 156.52525	2483.5 - 2500	17.7 - 21.4
8.37625 - 8.38675	156.7 - 156.9	2655 - 2900	22.01 - 23.12
8.41425 - 8.41475	162.0125 - 167.17	3260 - 3267	23.6 - 24.0
12.29 - 12.293	167.72 - 173.2	3332 - 3339	31.2 - 31.8
12.51975 - 12.52025	240 - 285	3345.8 - 3358	36.43 - 36.5
12.57675 - 12.57725	322 - 335.4	3600 - 4400	Above 38.6
13.36 - 13.41			

[1] Until February 1, 1999, this restricted band shall be 0.490-0.510 MHz.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of:

MDS MEDIA SYSTEMS File No. 8137-CM-P-83

For Authority to Construct and
Operate a Station in the Multichannel
Multipoint Distribution Service on the
F-Group Channel in Sandusky, Ohio

ORDER ON RECONSIDERATION

Adopted: May 24, 1993; Released: June 1, 1993

By the Chief, Domestic Facilities Division:

1. *Introduction.* MDS Media Systems (Systems) filed a petition for reconsideration of the dismissal by the Domestic Facilities Division (Division) on delegated authority of its application for authority to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the F-group channels at Sandusky, Ohio, and requested reinstatement of its application.

2. *Background.* As a result of a Commission lottery, the above-referenced application was selected for qualification review. Subsequently, Division staff initiated a qualification review of the application, pursuant to 47 C.F.R. §21.32. Upon examination, the application was found to contain several deficiencies that precluded the staff from making a finding that Systems was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of its application would serve the public interest. Systems was notified by letter of these deficiencies and provided an opportunity to cure them within thirty (30) days of the date of the letter.[1] Systems was also advised in the deficiency letter that failure to file the requested information within thirty days could result in the dismissal of its application.

3. Systems did not respond within thirty days of the deficiency letter. Three days after the deadline, Systems, through its counsel, notified the Commission that an engineering consultant had been retained to provide an analysis of possible impact on Canadian communications and to provide an ITFS interference study. No other information was provided. Approximately three months after the deficiency letter, Systems, through its counsel, requested an unspecified amount of additional time to respond to the deficiency letter, and provided a partial ITFS interference study. Eleven months after the deficiency letter, Systems provided a further partial interference study. Six additional months passed with no response from Systems. Pursuant to Sections 21.20(d) and 21.28(d), the Division dismissed System's application for failure to comply completely in a timely manner with the Division's request for information.

4. While admitting that the requested information had not been filed, Systems argues that its application should be reinstated because it had provided "substantial information" concerning the potential for interference and that it was going forth in good faith to resolve those problems, and because it had kept the Commission advised of the interference problems encountered and its attempts to resolve them. In addition, Systems argued that it could not provide a lease nor choose a site until it had completed coordination with a new MMDS applicant for the E-group channels. Systems argues that dismissal of its application is not fair because "literally dozens" of other applicants had not supplied requested information, and the Commission may not treat similarly situated applicants in a dissimilar manner, citing *Melody Music, Inc. v. F.C.C.*, 345 F.2d 730 (D.C. Cir. 1965).

5. *Discussion.* As of the date of the Division's dismissal letter, Systems still had not submitted all of the information necessary for evaluation of its qualifications to be an MMDS licensee. For example, Systems had not submitted a lease, lease option agreement, or other "concrete evidence" to demonstrate the availability of its proposed transmitter site as required by Section 21.15(a).[2] For MMDS applications subject to the Commission's lottery proceedings, a demonstration of reasonable assurance of site availability is sufficient prior to the lottery. However, once the lottery is held, a fully-executed lease, lease option agreement, or other concrete evidence of site availability must be submitted.[3] *Video/Multipoint, Inc.*, 6 FCC Rcd 5125, 5126 (Comm. Car. Bur. 1991).

6. In addition, Systems failed to comply with the request to submit a complete Section 21.902(i) interference analysis. At the time of dismissal, Section 21.902(i) required MMDS applicants to submit, prior to receiving construction authorization, and at such time as the Commission

---

[1] The deficiencies cited in the letter were the absence of: (1) correct antenna structure heights; (2) certification of financial qualifications required by Section 21.17; (3) an analysis concerning possible impact upon Canadian communications, as required by 47 C.F.R. §21.902(c)(5); (4) a non-affiliation statement, pursuant to 47 C.F.R. §21.900; (5) sufficient tariff showing, pursuant to Item 19 of FCC Form 435 and 47 C.F.R. §21.13; (6) updated licensee qualification report, FCC Form 430; (7) an analysis demonstrating lack of harmful interference to Instructional Television Fixed Service (ITFS) licensees, pursuant to 47 C.F.R. §21.902(i); and (8) a fully executed lease or option to lease/buy agreement pursuant to 47 C.F.R. §21.15(a).

[2] Even if Systems was not required to comply with the requirements of Section 21.15(a), it was required, pursuant to Section 21.13(c), to submit a lease or lease option agreement after the Division directed it to do so. Section 21.13(a) provides, *inter alia:* "In addition to the general application requirements of Secs. 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact: . . . (2) As the Commission, at any time after the filing of an application . . . may require from any applicant . . . to enable it to determine whether a radio authorization should be granted. . . ."

[3] Revision of Part 21 of the Commission's Rules, 2 FCC Rcd 5713, 5721 (1987) (Where there is a lottery "it shall be sufficient if the application adequately demonstrates reasonable assurance of the availability of the site. A license will not be granted, however, until concrete evidence of site availability is submitted.") The requirement to provide concrete evidence of site availability exists notwithstanding the activity or status of other adjacent channel licensees. If necessary to coordinate with other licensees, the conditional licensee can file for a minor change of transmitter location.

requested it, an analysis demonstrating that the proposed MMDS facilities would not cause harmful interference to existing cochannel or adjacent-channel ITFS stations within 50 miles of the MMDS station's proposed transmitter site, or alternatively, a consent statement from the ITFS licensee. By the express language of this rule, an MMDS applicant must submit an ITFS interference analysis at such time as the Commission requests it. Despite the specific request that this analysis be submitted by a specified date, Systems failed to do so. *See Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988).

7. Systems had a duty to submit curative amendments to its application within thirty days of the Division's written request, or to obtain an extension of time. *VisionAire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Its failure to submit curative amendments for more that one year substantially impeded the expeditious offering of MMDS at Sandusky, Ohio. Also, Systems' failure to respond in a timely manner to the Division's request for information hindered the discharge of the Commission's statutorily-imposed duties under Title III of the Communications Act. *By Direction of the Commission Letter to US West*, 60 Rad. Reg. 2d (P&F) 8, 9 (1984). At the time of the dismissal, Systems had not provided the required ITFS interference analysis and the required lease or lease option agreement, nor had it provided information regarding the other points in the deficiency letter. The Division was not in a position, therefore, to complete evaluation of Systems' MMDS station proposal and its qualifications to be an MMDS licensee. *Multi-Point Television Distributors, Inc.*, 5 FCC Rcd 519, 520 (Comm. Car. Bur. 1990).[4]

8. *Conclusion and Ordering Clause.* Having carefully considered the arguments and evidence presented, we find that dismissal of this application for failure to comply with the Division's requests for information was proper, reconsideration of that action is not warranted, and reinstatement of the application is not justified. Accordingly, IT IS ORDERED that the petition for reconsideration filed by MDS Media Systems regarding the above-referenced MMDS application IS DENIED. This order is issued pursuant to 47 C.F.R. §0.291, and is effective on its release date. *See* 47 C.F.R. §1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[4] Systems is incorrect that it has been treated differently from other applicants who have failed to perfect their applications after being chosen for qualification review in a lottery. *See, e.g.*, Sherry N. Rullman, 8 FCC Rcd 450 (Dom. Fac. Div. 1993), Haddonfield Wireless Company, 7 FCC Rcd 8534 (Dom. Fac. Div. 1992), and cases cited herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 19, 1993

ALLTEL SERVICE CORPORATION REQUESTS WAIVER OF SECTION 61.41 OF THE COMMISSION'S RULES

Pleading Cycle Established

Comments: June 21, 1993
Reply Comments: July 6, 1993

On May 14, 1993, ALLTEL Service Corporation, on behalf of the telephone operating company subsidiaries of ALLTEL Corporation (ALLTEL), filed a petition for waiver of Section 61.41(c) of the Commission's Rules, 47 C.F.R. § 61.41(c). ALLTEL seeks a waiver of this rule section in order to remain under rate-of-return regulation after aquiring certain telephone exchanges in Georgia from subsidiaries of GTE Corporation, which currently are subject to price cap regulation.

According to ALLTEL, grant of its waiver petition would not undermine the purposes of Section 61.41(c) because it lacks the ability to shift costs between price cap and rate of return affiliates, or to "game" the price cap system. ALLTEL also states that grant of its request would serve the public interest because the planned acquisition of the Georgia exchanges, which are contiguous with existing ALLTEL exchanges, will allow it to realize substantial economies of scale in its Georgia exchange service.

Interested parties may file comments on this petition for waiver no later than **June 21, 1993.** Replies should be filed by **July 6, 1993.**

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037 and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Andrew Mulitz, Tariff Division, Common Carrier Bureau, (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 2, 1993

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS' REQUEST FOR CLARIFICATION OR, ALTERNATIVELY, PETITION FOR RULEMAKING, CONCERNING DIRECT ASSIGNMENT OF COST STUDY EXPENSES (AAD 93-44)

Public Comment Invited

Comment date: June 30, 1993
Reply date: July 23, 1993

On April 6, 1993, the National Association of Regulatory Utility Commissioners (NARUC) filed a petition requesting the Commission to clarify or interpret its Part 36 rules to require that carriers directly assign the reasonable expenses of wholly interstate cost studies to the interstate jurisdiction. Alternatively, NARUC petitioned the Commission to initiate a rulemaking to amend the Part 36 rules to allow such direct assignment. NARUC, whose petition is limited to the direct assignment of cost study expenses, believes such assignment has already been established by historical practice and by previous Commission orders.

Parties may file comments on this petition no later than June 30, 1993. Replies should be filed by July 23, 1993. Comments should reference AAD 93-44. A copy of each pleading should be sent to Bob Hall, Common Carrier Bureau, 2000 L Street N.W., Suite 812, Washington, D.C., 20554, and to International Transcription Service, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C., 20037, 202-857-3800. Copies are available for public inspection and copying in the Accounting and Audits public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from ITS.

For further information contact Bob Hall at 202-634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-135

In the Matter of

Amendment of Section 73.202(b), RM-7697
Table of Allotments,
FM Broadcast Stations.
(Boonville and Columbia, Missouri)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: April 28, 1993; Released: June 3, 1993

By the Chief, Policy and Rules Division:

1. Before the Commission is a Petition for Reconsideration of the *Report and Order* in this proceeding, 7 FCC Rcd 2970 (1992),[1] filed by NCD Broadcasting Co., Inc. ("NCD"), permittee of Station KNCD, Channel 230A at Columbia, Missouri.[2] The *Report and Order* granted a petition for rule making filed by Big Country of Missouri, Inc. ("Big Country") proposing the allotment of Channel 230A to Boonville, Missouri, as that community's second FM broadcast service, and the substitution of Channel 272A for Channel 230A at Columbia, Missouri to accommodate the Boonville allotment.[3] Big Country filed an opposition to NCD's petition for reconsideration, and NCD filed reply comments. For the reasons stated below, we will deny NCD's petition for reconsideration.

2. *Background.* In its counterproposal to the *Notice of Proposed Rule Making* in this proceeding, 6 FCC Rcd 2535 (1991), NCD proposed the allotment of Channel 226A to Boonville in lieu of Channel 230A so that Channel 230A may remain allotted to Columbia. NCD noted that present channel spacing restrictions would permit NCD to eventually upgrade service on Channel 230A to Channel 230C3 at Columbia, but would not accommodate a service upgrade on Channel 272A. NCD argued that the substitution of Channel 272A for Channel 230A at Columbia contradicts the Commission's public policy of favoring expanded service. However, in the *Report and Order,* we dismissed NCD's counterproposal because the proposed Channel 226A at Boonville is short-spaced to Station KLSI (now Station KMXV), Channel 227C, Kansas City, Missouri. We also stated that we would not deny a proposal for a new allotment solely to protect a potential upgrade.

3. *Petition for reconsideration.* NCD claims that, in determining that proposed Channel 226A at Boonville is short-spaced to Station KLSI in Kansas City, Commission staff relied upon coordinates for Channel 226A that NCD misidentified at one place in the channel spacing study appended to its counterproposal. NCD states that it correctly identified the proper coordinates for proposed Channel 226A at Boonville at several other locations in its counterproposal.[4] NCD thus argues that substituting Channel 272A for its permitted Channel 230A at Columbia is unnecessary because Channel 226A is available for allotment to Boonville in lieu of Channel 230A. Finally, NCD again asserts that ordering the substitution of Channel 272A for Channel 230A at Columbia prevents NCD from eventually upgrading its service to C3 status.

4. Big Country filed an opposition to NCD's petition for reconsideration. First, Big Country argues that NCD, in seeking to maintain the allotment of Channel 230A to Columbia, is simply protecting its own private interest in a potential service upgrade and is ignoring the strong public interest in a new FM station at Boonville. Second, Big Country contends that NCD fails to state an adequate basis for reconsideration of the *Report and Order.*[5] Finally, Big Country asserts that NCD, in filing the petition, is trying to correct the errors contained in its counterproposal, and the petition for reconsideration should therefore be denied as an untimely attempt to supplement the record.

5. NCD filed a reply to Big Country's opposition in which it counters Big Country's argument that NCD failed to state a cognizable basis for reconsideration. NCD states that it is not relying on new or previously undiscovered facts. Rather, NCD relies on its previous assertion that allotting Channel 226A to Boonville affords the most beneficial use of the radio spectrum in that it allows for NCD's potential upgrade of Channel 230A to Channel 230C3, if maintained at Columbia. Finally, NCD questions Big

[1] Public notice of the filing of NCD's petition for reconsideration was given on June 21, 1992, Report No. 1990.

[2] NCD also filed a supplement to its petition for reconsideration, requesting a stay of the effective date of the *Report and Order* until we rule on its petition for reconsideration. Big Country objected to this supplement in its opposition comments. In view of our action herein, we dismiss NCD's supplement to petition for reconsideration as moot. In addition, NCD filed an errata to its petition for reconsideration, correcting a misidentification of the rule under which NCD filed its petition. We herein accept this errata.

[3] A pending application by Big Country for Channel 230A at Boonville is on file with the Commission (File No. BPH-920715MA).

[4] The coordinates NCD intended to identify for proposed Channel 226A at Boonville are North Latitude 38-53-45, West Longitude 92-36-00. NCD's channel spacing study misidentified these coordinates as North Latitude 38-53-45, West Longitude 92-53-45.

[5] Big Country references Section 1.429(b) of the Commission's rules, which states that a petition for reconsideration which relies on facts which have not previously been presented to the Commission will be granted only under the following circumstances: (1) The facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present them to the Commission; (2) The facts relied on were unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercize of ordinary diligence have learned of the facts in question prior to such opportunity; or, (3) The Commission determines that consideration of the facts relied on in the petition is required in the public interest. Big Country asserts that Sections 1.429(b)(1) and 1.420(b)(2) clearly do not apply, and that NCD's petition for reconsideration should not be accepted under Section 1.429(b)(3) because the petition serves only NCD's private interest in a potential service upgrade, and not any cognizable public interest. We disagree, as consideration of NCD's claim of Commission error will serve the public interest.

Country's motivation in opposing NCD's counterproposal given that no significant differences exist, for Big Country's purposes, between the allotment of Channel 226A at Boonville or Channel 230A.[6]

6. *Discussion.* After careful consideration of the pleadings in this proceeding, we will deny NCD's petition for reconsideration because channel spacing requirements prevent the proposed allotment of Channel 226A to Boonville in lieu of Channel 230A. Commission staff employed the coordinates for Channel 226A intended by NCD in its counterproposal, as well as other theoretical sites, in attempting to locate proposed Channel 226A at Boonville. However, our analysis shows that proposed Channel 226A at Boonville, regardless of site restriction, cannot concurrently meet channel spacing requirements to Station KLSI, Channel 227C, Kansas City, Missouri, and to a counterproposal in MM Docket No. 90-66 to substitute Channel 227C1 for Channel 227C2 at Steelville, Missouri.[7] The comment period for filing counterproposals in MM Docket No. 90-66 expired on May 7, 1990, and NCD's counterproposal for allotting Channel 226A to Boonville was filed on June 6, 1991.[8] Therefore, NCD's counterproposal, when initially filed, was untimely for consideration in that proceeding and is unacceptable for consideration in the present proceeding.[9] *See Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments,* 5 FCC Rcd 931 n.4 (1990). We thus reaffirm the allotment of Channel 230A to Boonville, and will modify the construction permit of NCD to specify Channel 272A at Columbia.

7. NCD's construction permit for Channel 230A at Columbia was issued by the Commission on a conditional basis, dependent on the outcome of this proceeding.[10] Thus, at the time it filed its construction permit for Channel 230A at Columbia, NCD was placed on notice that Channel 272A could yet be substituted for Channel 230A at Columbia, as ordered herein.

8. THEREFORE, IT IS ORDERED, That the Petition for Reconsideration filed by NCD Corporation IS DENIED.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Lawrence A. Walke, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[6] NCD states correctly that neither Channel 230A nor Channel 226A at Boonville may potentially be upgraded to C3 status. NCD acknowledges that Big Country would be required to amend the application it filed for Channel 230A at Boonville to specify Channel 226A. However, NCD asserts that taking such an action would be only a minor inconvenience.

[7] We believe that NCD's engineering analysis for Channel 226A at Boonville was incorrect when submitted, as the technical reports submitted by NCD in support of its counterproposal apparently fail to account for the spacing restrictions presented by proposed Channel 227C1 at Steelville.

[8] The *Notice of Proposed Rulemaking* in MM Docket No. 90-66 was adopted on May 2, 1990. A counterproposal to upgrade Channel 227C2 to Channel 227C1 at Steeville, Missouri was timely filed on April 20, 1990, and placed on public notice on May 7, 1990.

[9] Although the Steelville proposal was denied by *Report and Order* in MM Docket No. 90-66, 7 FCC Rcd 3015 (1992), the Steelville proponent filed a petition for reconsideration of the action. Therefore, the conflicting use of Channel 227C1 remains pending.

[10] *See* NCD's construction permit for Channel 230A at Columbia, Missouri (File No. BPH-880531MZ).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-139

In the Matter of

Amendment of Section 73.202(b), RM-8211
Table of Allotments,
FM Broadcast Stations.
(Anchorage, Alaska)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 6, 1993; Released: June 3, 1993

Comment Date: July 26, 1993
Reply Comment Date: August 10, 1993

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed by American Radio Brokers, Inc. ("petitioner"), proposed assignee of Station KXDZ(FM),[1] [2] Anchorage, Alaska, requesting the substitution of Channel 275C1 for Channel 275C2 at Anchorage, and modification of the license for Station KXDZ(FM) accordingly.[3] Petitioner stated its intention to apply for Channel 275C1 if allotted to Anchorage, as requested.

2. We believe the public interest would be served by consideration of petitioner's proposal since it could provide Anchorage with an expanded coverage area FM service. Channel 275C1 can be allotted to Anchorage in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules at the petitioner's specified site, located 24.9 kilometers (15.5 miles) northwest of the community.[4]

3. Petitioner's modification request at Anchorage conforms with the provisions of Section 1.420(g) of the Commission's Rules. Therefore, we shall propose to modify the license for Station KXDZ(FM) without entertaining competing expressions of interest in the use of Channel 275C1 at Anchorage, or requiring the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. In view of the above, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Anchorage, Alaska, as follows:

City	Channel No. Present	Channel No. Proposed
Anchorage, Alaska	225C, 247C1, 251C1, 255C1, 263C2, 267C, 271C3, 275C2, 281C1, 271C3, 293C, 298C	225C, 247C1, 251C1, 255C1, 263C2, 267C, 271C3, 275C1, 281C1, 287C1, 293C, 298C

5. IT IS ORDERED, That the Secretary shall send a copy of this *Notice* to the licensee of Station KXDZ(FM), as follows: Korlyn Broadcasting, Inc., 4045 Lake Otis, #202, Anchorage, AK 99508.

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **July 26, 1993,** and reply comments on or before **August 10, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

David Tillotson, Esq.
3421 M Street, N.W.
Suite 1739
Washington, D.C. 20007

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written

[1] An application for the voluntary assignment of license of Station KXDZ(FM) from Korlyn Broadcasting, Inc. ("Korlyn") to American Radio Brokers, Inc. was filed on February 26, 1993 (File No. BALH-930216HW). Petitioner stated that upon consummation of the assignment of license, it will apply for the upgraded facilities for Station KXDZ(FM), if granted.

[2] Petitioner's proposal included a statement from Korlyn authorizing the petitioner to request a modification of Station KXDZ(FM)'s license at Anchorage to specify operation on Channel 275C1. We will serve a copy of this *Notice* on Korlyn.

[3] Although Korlyn is presently licensed to operate on Channel 275A, its license was modified to specify operation of Station KXDZ(FM) on Channel 275C2 at Anchorage in MM Docket No. 88-29. *See* 4 FCC Rcd 8504 (1989).

[4] Coordinates used for Channel 275C1 at Anchorage are 61-26-10 and 149-59-57.

information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-138

In the Matter of

Amendment of Section 73.202(b), RM-8225
Table of Allotments,
FM Broadcast Stations.
(Lahoma, Oklahoma)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 6, 1993; **Released: June 3, 1993**

Comment Date: July 26, 1993
Reply Comment Date: August 10, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Donald W. McCoy ("petitioner") requesting the substitution of Channel 239C3 for Channel 239A at Lahoma, Oklahoma, and the modification of his construction permit for a new station on Channel 239A. Petitioner failed to state his intention to apply for Channel 239C3, if allotted to Lahoma, and should correct this deficiency in response to this *Notice*.[1] *See* paragraph 2 of the attached Appendix.

2. We believe the public interest would be served by proposing the substitution of Channel 239C3 for Channel 239A at Lahoma, Oklahoma, since it could provide the community with its first wide area coverage FM service. Channel 239C3 can be allotted to Lahoma in compliance with the Commission's minimum distance separation requirements with a site restriction 4.8 kilometers (3 miles) northeast to accommodate petitioner's desired transmitter site.[2] In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Lahoma or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

City	Channel No. Present	Proposed
Lahoma, Oklahoma	239A	239C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **July 26, 1993,** and reply comments on or before **August 10, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Donald W. McCoy
1802 Marksdale
Colwich, Kansas 67030
(Petitioner)

Larry P. Waggoner
1712 Valleyview Court
Wichita, Kansas 67212-1245
(Consultant to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] We note that the petitioner complied with Section 1.52 of the Commission's Rules to the extent that he signed the petition. However, he failed to include an affidavit verifying that the statements contained in the petition were accurate to the best of his knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his address stated. In the absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes,* 5 FCC Rcd 3911, n.41 (1990). Petitioner is requested to rectify this omission in his comments.

[2] The coordinates for Channel 239C3 at Lahoma are North Latitude 36-25-00 and West Longitude 98-03-00.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-137

In the Matter of

Amendment of Section 73.202(b), RM-8227
Table of Allotments,
FM Broadcast Stations.
(Hastings, Nebraska)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 6, 1993; Released: June 3, 1993

Comment Date: July 26, 1993
Reply Comment Date: August 10, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Allen's of Hastings Radio ("petitioner") requesting the allotment of Channel 233C2 to Hastings, Nebraska, as the community's second local FM service. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 233C2 to Hastings since it could provide the community with its first local competitive FM service. Channel 233C2 can be allotted to Hastings in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.4 kilometers (4.0 miles) northwest to avoid a short-spacing to Station KJCK-FM, Channel 233C1, Junction City, Kansas.[1] The proposal must also conform with the technical requirements of Section 73.1030(c)(1)-(5) of the Commission's Rules regarding protection to the Commission's monitoring station at Grand Island, Nebraska.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Hastings, Nebraska	268C	233C2, 268C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **July 26, 1993,** and reply comments on or before **August 10, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Gary S. Smithwick, Esq.
Smithwick & Belendiuk, P.C.
1990 M Street, N.W., Suite 510
Washington, D.C. 20036
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 233C2 at Hastings are North Latitude 40-38-23 and West Longitude 98-25-25.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-136

In the Matter of

Amendment of Section 73.202(b), RM-8161
Table of Allotments,
FM Broadcast Stations.
(Key Colony Beach, Key Largo,
and Marathon, Florida)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: May 6, 1993; Released: June 3, 1993

Comment Date: July 26, 1993
Reply Comment Date: August 10, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Spanish Broadcasting System of Florida, Inc. ("petitioner"), licensee of Station WZMQ(FM), Channel 280C2, Key Largo, Florida, requesting the substitution of Channel 292C2 for Channel 280C2 at Key Largo, and the modification of its license to specify operation on Channel 292C2. In order to permit the substitution of Channel 292C2 for Channel 280C2 at Key Largo, petitioner also requests the substitution of Channel 280C2 for Channel 288C2 at Key Colony Beach, Florida, and the modification of Station WKKB(FM)'s construction permit to specify Channel 280C2; and the substitution of Channel 288A for Channel 292A at Marathon, Florida, and the modification of Station WAVK(FM)'s license to specify Channel 288A. Petitioner states that it will apply for Channel 292C2, if allotted.

2. In support of its proposal, petitioner states that the proposed rearrangement of channels is requested to reduce the potential for receiver induced third order intermodulation interference that has been observed in some automobile receivers within the vicinity of the shared antenna transmitter site of Station WZMQ(FM), Channel 280C2, Key Largo, and Station WKLG(FM), Channel 271C2, Rock Harbor, Florida. Petitioner contends that Stations WZMQ(FM) and WKLG(FM) are co-located at a site approximately 19 kilometers (11.8 miles) northeast of Station WCTH(FM), and interference impacts reception of Station WCTH(FM), Channel 262C1, Plantation Key, Florida. Petitioner states the rearrangement of channels and the new separations will cure the interference by separating the presently co-located Channels 271C2 and 280C2. As proposed the two channels would be separated by 79 kilometers (49.1 miles).

3. We believe the public interest would be served by seeking comment on the proposed substitution of Channel 292C2 for Channel 280C2 at Key Largo, Florida, Channel 280C2 for Channel 288C2 at Key Colony Beach, Florida, and Channel 288A for Channel 292A at Marathon, Florida, since the new separations would cure the alleged interference problem. We note that petitioner offers no evidence of interference, and is requested to do so in comments. Channel 292C2 can be allotted to Key Largo in compliance with the minimum distance separation requirements of the Commission's Rules with a site restriction of 20.3 kilometers (12.6 miles) southwest of the community.[1] Channel 280C2 can be substituted for Channel 288C2 at Key Colony Beach at the construction permit site for Station WKKB(FM).[2] Channel 288A can be substituted for Channel 292A at Marathon at the licensed site of Station WAVK(FM).[3]

4. Whenever an existing licensee or permittee is ordered to change frequencies in order to accommodate a new channel allotment, Commission policy requires the benefitting party to reimburse the affected station for costs incurred. Petitioner states its willingness to reimburse the licensee of Station WAVK(FM) and the permittee of Station WKKB(FM) for the reasonable cost associated with the change in channels at Key Colony Beach and Marathon, Florida. We are herein issuing an *Order to Show Cause* to Richard L. Silva, permittee of Station WKKB(FM), Channel 280C2, Key Colony Beach, Florida, and Key Chain, Inc., licensee of Station WAVK(FM), Channel 292A, Marathon, Florida, to show why their respective authorizations should not be modified as proposed.

5. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Key Colony Beach, Florida	288C2	280C2
Key Largo, Florida	280C2	292C2
Marathon, Florida	292A	288A

6. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Richard L. Silva, permittee of Station WKKB(FM), Channel 280C2, Key Colony Beach, Florida, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 288C2 in lieu of Channel 280C2.

7. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Key Chain, Inc., licensee of Station WAVK(FM), Channel 292A, Key Colony Beach, Florida, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 288A in lieu of Channel 292A.

[1] The coordinates for Channel 292C2 at Key Largo are North Latitude 24-57-20 and West Longitude 80-34-50.
[2] The coordinates for Channel 280C2 at Key Colony Beach are North Latitude 24-42-25 and West Longitude 81-06-17.
[3] The coordinates for Channel 288A at Marathon are North Latitude 24-43-44 and West Longitude 81-02-05.

8. Pursuant to Section 1.87 of the Commission's Rules, Richard L. Silva and Key Chain, Inc., may, not later than **July 26, 1993,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause.* The Commission may call on Richard L. Silva, to furnish additional information. If Richard L. Silva and Key Chain, Inc., raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Richard L. Silva and Key Chain, Inc., will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

9. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Richard L. Silva	Key Chain, Inc.
35 Sommbrero Blvd	5500 W. W. 98th Paris
Marathon, FL 33050	Miami, FL 33156
(Permittee for Station	(Licensee for Station
WKKB(FM))	WAVK(FM))

10. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

11. Interested parties may file comments on or before **July 26, 1993,** and reply comments on or before **August 10, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

James M. Weitzman
Allan G. Moskowitz
Kaye, Scholer, Fierman,
Hays & Handler
901 15th Street, N.W., Suite 1100
Washington, D.C. 20005
(Attorneys for Petitioner)

12. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

13. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial com-

ments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-318

In the Matter of

Amendment of Section 73.202(b),	RM-7853
Table of Allotments,	RM-7889
FM Broadcast Stations.	RM-7890
(Three Lakes, Newbold, Nakoosa and Port Edwards, Wisconsin)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 6, 1993; Released: June 3, 1993

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 6515 (1991), issued in response to a petition filed by Three Lakes Broadcasting ("petitioner"). The *Notice* proposed the allotment of Channel 229C2 to Three Lakes, Wisconsin, as that community's first local broadcast service. Petitioner filed comments reaffirming its commitment to apply for the channel at Three Lakes.[2] Pacer Radio of Oneida ("Pacer Radio") and Berry Radio Company ("Berry Radio") filed separate counterproposals.[3] Russell A. Crass ("Crass"), Chief Engineer, WAOW TV9, Wausau, Wisconsin, and Free Air Waves ("FAW") filed informal comments.[4] Petitioner and Berry Radio filed reply comments.

2. We have reviewed the pleadings before us and find that the public interest would be served by the allotment of Channel 229C2 to Three Lakes, Wisconsin, as that community's first local broadcast service. Channel 229C2 can be allotted to Three Lakes consistent with the minimum distance separation requirements of Section 73.207 of the

[1] The communities of Newbold, Nekoosa and Port Edwards, Wisconsin, have been added to the caption.

[2] The *Notice* requested petitioner to clarify the population of Three Lakes. According to petitioner, the Town Clerk of Three Lakes gives the 1991 population as 2,009.

[3] The counterproposal filed by Pacer Radio requested the allotment of Channel 229C3 to Newbold, Wisconsin, as that community's first local service (RM-7889). Berry Radio counterproposed the substitution of Channel 229C3 for Channel 229A at Nekoosa, Wisconsin, and reallotment of the channel from Nekoosa to Port Edwards, Wisconsin (RM-7890). The counterproposals were placed on public notice on January 28, 1992 (Report No. 1872). Upon further analysis, we have determined that Pacer Radio and Berry Radio failed to include affidavits verifying that the statements contained in their proposals were accurate to the best of their knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel shall be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.402(b) of the Commission's Rules concerning rule making proceedings places petitioner on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See South Webster, Ohio*, 4 FCC Rcd 5593 (1989). *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, n.41 (1990). Counterproposals must be technically and procedurally correct at the time of their filing. *See Fort* Bragg, California, 6 FCC Rcd 5817 (1991) and *Report and Order, Broken Arrow and Bixby, Oklahoma and Coffeeville, Kansas*, 3 FCC Rcd 6507 (1988), *recon. denied*, 4 FCC Rcd 6981 (1989). Therefore, we will dismiss the counterproposals filed by Pacer Radio and Berry Radio. Accordingly, comments filed in response to the counterproposals need not be considered.

We note that Pacer Radio did not supply any information in the counterproposal showing that Newbold qualifies as a community for allotment purposes. Although Pacer Radio did respond to a *Request for Supplemental Information*, 8 FCC Rcd 763 (1993), questioning the community status of Newbold, based on the totality of the evidence submitted by Pacer Radio, we believe it has failed to establish that Newbold qualifies as a community for allotment purposes and therefore it would not serve the public interest to allot a channel. *See Mokelumne Hill, California*, 4 FCC Rcd 7108 (1989). While Pacer Radio has alleged that there are some local businesses, churches and schools, it has not specifically identified these entities with addresses or shown that they are intended to serve Newbold, as opposed to other areas. This is a critical deficiency because, in past cases, we have rejected claims of community status where a nexus has not been shown between the political, social and commercial organizations and the community in question. *See Gretna, Marianna, Quincy and Tallahasee, Florida*, 6 FCC Rcd 633 (1991), and cases cited therein. According to the *1992 Rand McNally Commercial Atlas*, Newbold has a population of 2,281 but shares mail services with Rhinelander, Wisconsin, a community of 7,873. Newbold is located approximately six miles from the center of Rhinelander. Furthermore, our engineering analysis indicates that Pacer Radio's proposed site (45-50-00 and 89-27-30) is in swampland and may be unusable for construction of an FM antenna.

A Commission staff analysis of the site specified by Berry Radio for Channel 229C3 at Port Edwards indicates a line-of-sight problem. Our analysis shows that to overcome this problem, Berry Radio would need a tower of 170 meters and would have to operate at reduced power (8.6 kilowatts).

[4] Crass and FAW contend that allotment of Channel 229C2 at Three Lakes will cause interference to the reception of TV Channel 9 in the Three Lakes area. Crass states that high gain antennas and antenna preamplifiers are a necessity to receive the signal of Channel 9 off-the-air in Three Lakes. As an initial matter, we find this allegation to be speculative and we will not address it herein. Such claims are more appropriately addressed at the authorization state. Furthermore, our analysis indicates that any alleged interference would occur outside the Grade B contour of the television station. Station WAOW is not entitled to protection beyond the protected area.

Commission's Rules without a site restriction.[5] Channel 229C2 is short spaced to Channel 232A, Eagle River, Wisconsin. However, Channel 233C2 has been substituted for Channel 232A in MM Docket 88-313.[6] Canadian concurrence has been obtained for this allotment since Three Lakes is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 19, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Three Lakes, Wisconsin	229C2

4. The window period for filing applications for Channel 229C2 at Three Lakes will open on **July 20, 1993** and close on **August 19, 1993**.

5. IT IS FURTHER ORDERED, That the counterproposal filed by Berry Radio Company (RM-7890) IS DISMISSED.

6. IT IS FURTHER ORDERED, That the counterproposal filed by Pacer Radio of Oneida (RM-7889) IS DISMISSED.

7. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Pacer Radio of Oneida
1296 Marian Lane
Green Bay, Wisconsin 54304

Berry Radio Company
725 South Irwin Avenue
Green Bay, Wisconsin 54301

8. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[5] The coordinates for Channel 229C2 at Three Lakes are 45-47-48 and 89-10-06.

[6] *See* 4 FCC Rcd 3793 (1989). A construction permit for Channel 233C2 at Eagle River was granted on July 12, 1990 (BPH-900501IA). An application for a license to cover the construction permit has been accepted for filing. (BLH-901120KB).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 81-893

In the Matter of

Procedures for Implementing
the Detariffing of Customer Premises
Equipment and Enhanced Services
(Second Computer Inquiry)

MEMORANDUM OPINION AND ORDER

Adopted: May 7, 1993 **Released: May 27, 1993**

By the Commission:

1. In this Order, we eliminate the National Security and Emergency Preparedness (NSEP) CPE reporting requirements established in the *Sixth Report and Order* in the *CPE Detariffing* proceeding.[1] In that Order, the Commission required the American Telephone and Telegraph Co. (AT&T) and Bell Operating Companies (BOCs) to report to the Chief, Common Carrier Bureau whenever they provided customer premises equipment (CPE) for certain NSEP communications purposes on an integrated corporate basis rather than through a separate subsidiary.

2. In the *Second Computer Inquiry*,[2] the Commission established a set of rules which required AT&T and the BOCs to provide CPE through separate subsidiaries. However, in order to enable AT&T and the BOCs to provide a single point of contact for twenty-one designated NSEP systems and ensure that they are adequately maintained and managed for end-to-end communications services, the Commission subsequently granted AT&T and the BOCs a narrow waiver of the separate subsidiary requirement.[3] This waiver authorized the BOCs to handle the acquisition of limited amounts of new CPE to replace embedded CPE in the designated systems and the reasonable augmentation of these systems. It also authorized AT&T and the BOCs to handle the acquisition of unlimited amounts of CPE to support presidentially-declared and other emergencies.

3. Due to the possible effect on competition for CPE sales for NSEP systems, and to ensure that AT&T and the BOCs did not misuse the waiver, the Commission required AT&T and the BOCs to submit two types of reports to the Common Carrier Bureau. First, AT&T and the BOCs are required to report quarterly on the types and quantities of new CPE provided pursuant to this waiver. Second, AT&T and the BOCs must report when the waiver is used and an unaffiliated alternative supplier cannot be named.[4]

4. In a Notice of Proposed Rulemaking released September 16, 1992, the Commission proposed to eliminate the NSEP CPE reporting requirements because they were no longer necessary.[5] The Bell Atlantic Telephone Companies (Bell Atlantic) and Ameritech Operating Companies (Ameritech) filed comments and Pacific Bell and Nevada Bell (Pactel) filed reply comments supporting elimination of the NSEP CPE reporting requirements. They argue that the reporting requirements should be eliminated because: (1) the BOCs and AT&T are no longer required to provide CPE on a structurally separated basis; (2) the CPE market is competitive; (3) the Commission has not received complaints regarding the abuse of the waiver; and (4) the removal of the reporting requirement will eliminate an unnecessary reporting burden for AT&T and the BOCs.[6] No comments were filed opposing removal of the reporting requirements.

5. We agree with Bell Atlantic, Ameritech, and Pactel that it is no longer necessary for AT&T and the BOCs to submit these reports. Since the release of the *Sixth Report and Order*, the Commission has removed the structural separation requirements for AT&T and BOC provision of CPE.[7] The CPE market has been very competitive for a number of years and there are many suppliers available to provide CPE.[8] During the period that AT&T and the BOCs have been reporting, we have not received any formal complaints alleging abuse of the waiver, nor have the reports AT&T and the BOCs filed indicated any problems. We conclude that removing the NSEP reporting requirements is in the public interest because it eliminates an unnecessary reporting burden on AT&T and the BOCs.

6. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4, 201-205, 218, 220, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154,

---

[1] Procedures for Detariffing of Customer Premises Equipment and Enhanced Services, Report and Order, CC Docket No. 81-893, 99 FCC 2d 1066 (1985) (*Sixth Report and Order*).

[2] Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 FCC 2d 384 (1980) (*Computer II Final Order*), *modified on recon.*, 84 FCC 2d 50 (1980), (*Computer II Reconsideration Order*), *modified on further recon.*, 88 FCC 2d 512 (1981), (*Computer II Further Reconsideration Order*), *aff'd sub nom. Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), *aff'd on second further reconsideration*, FCC 84-190 (released May 4, 1984).

[3] *Sixth Report and Order*, 99 FCC 2d at 1077, para. 26.

[4] *Id.* at 1080, para. 32; 1082, para. 37-38.

[5] Procedures for Detariffing of Customer Premises Equipment and Enhanced Services, Notice of Proposed Rulemaking, CC Docket No. 81-893, 7 FCC Rcd 4224 (1992).

[6] Bell Atlantic Comments at 1; Ameritech Comments at 1; Pactel Reply Comments at 2.

[7] *See* Furnishing of Customer Premises Equipment by Bell Operating Telephone Companies and the Independent Telephone Companies, Report and Order, 2 FCC Rcd 143 (1987) (*BOC CPE Relief Order*) (removing structural separation requirements for BOC provision of customer premises equipment), *modified on reconsideration*, 3 FCC Rcd 22 (1987) (modifying and clarifying several aspects of nonstructural safeguards); Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone and Telegraph Co., Order, 102 FCC 2d 655 (1985) (*AT&T Structural Relief Order*), *modified in part on recon.*, FCC 86-341, 104 FCC 2d 739 (1986) (*AT&T Structural Relief Reconsideration Order*).

[8] *BOC CPE Relief Order*, 2 FCC Rcd at 144, para. 10; Ameritech Comments at 1-2.

201-205, 218, 220, and 403, that the NSEP CPE reporting requirements established in the *Sixth Report and Order* in the CPE Detariffing proceeding ARE ELIMINATED.[9]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[9] This decision shall be effective 30 days after publication of the Order in the Federal Register.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

BROADCAP OF FLORIDA, INC. File No. BAL-930211EA

For Assignment of License
of WTMP(AM)
Temple Terrace, Florida

ORDER

Adopted: May 24, 1993; Released: May 25, 1993

By the Commission:

1. On April 12, 1993, acting pursuant to authority delegated in 47 C.F.R. Sec. 0.283, the Chief, Mass Media Bureau, granted the above-captioned application for assignment of license of Station WTMP(AM), Temple Terrace, Florida, from Broadcap of Florida, Inc. to DMPG Broadcasting Group, Inc. Official public notice of that action was given on April 15, 1993. Pursuant to 47 C.F.R. Sec. 1.117, the Commission may, on its own motion, set aside such actions taken pursuant to delegated authority within 40 days after public notice is given.

2. Information has come to the Commission's attention concerning the above-captioned application which warrants further review. Accordingly, upon our own motion, pursuant to 47 C.F.R. Sec. 1.117, the April 12, 1993 grant of that application IS HEREBY RESCINDED, and the application is returned to pending status.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AFFINITY NETWORK
INCORPORATED
Complainant,

v. File No. E-92-40

AMERICAN TELEPHONE
& TELEGRAPH COMPANY,
Defendant.

PROTECTIVE ORDER

Adopted: May 27, 1993; Released: June 3, 1993

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

To expedite the flow of discovery material, facilitate the prompt resolution of disputes over confidentiality, protect adequately material entitled to be kept confidential, and insure that protection is afforded only to material so entitled, and with the consent of the parties, IT IS ORDERED:

1. Except with the prior written consent of the party or other person originally designating a document to be stamped as a confidential document, or as hereinafter provided under this Order, no stamped confidential document may be disclosed to any person, except as required by law, or for purposes of a Commission audit, whether or not related to the instant Complaint.

2. For purposes of this Order, a "stamped confidential document" means any document that bears the legend (or which shall otherwise have had the legend recorded upon it in a way that brings its attention to a reasonable examiner) "CONFIDENTIAL-SUBJECT TO PROTECTIVE ORDER IN File No. E-92-40, before the Federal Communications Commission" to signify that it contains information believed to be subject to protection under Sections 0.457 and 0.459 of the Commission's Rules, 47 C.F.R. §§ 0.457, 0.459.

3. For purposes of this Order, the term "document" means all written, recorded, or graphic material, whether produced or created by a party or another person, whether produced pursuant to the Commission's rules, subpoena, by agreement, or otherwise. Interrogatory answers, responses to requests for admission, deposition transcripts and exhibits, pleadings, motions, affidavits, and briefs that quote, summarize, or contain materials entitled to protection may be accorded status as a stamped confidential document, but, to the extent feasible, shall be prepared in such a manner that the confidential information is bound separately from that not entitled to protection.

4. Notwithstanding paragraphs 1, stamped confidential documents may be disclosed to counsel for the parties in this action, including in-house counsel for American Telephone and Telegraph Company ("AT&T") who are actively engaged in the conduct of this litigation; to the partners, associates, secretaries, paralegal assistants, and employees of such an attorney to the extent reasonably necessary to render professional services in the litigation; to persons with prior knowledge of the documents or the confidential information contained therein, and their agents; and to Commission officials, including court reporters, persons operating video recording equipment at depositions. Disclosure may not be made to counsel involved in any related litigation between the parties pending before the Commission or in courts, except upon specific Commission approval.

5. Subject to the provisions of subparagraph (c) below, such documents may also be disclosed:

(a) to any person designated by the Commission in the interest of justice, upon such terms as the Commission may deem proper after due notice and opportunity to comment has been afforded the party or person designating the document as confidential, or to any person designated by the Commission to conduct an audit; and

(b) in the event the Commission orders that depositions may be taken, to persons noticed for depositions or designated as trial witnesses to the extent reasonably necessary in preparing to testify; to outside consultants or experts retained for the purpose of assisting counsel in the litigation; to employees of parties involved solely in one or more aspects of organizing, filing, coding, converting, storing, or retrieving data or designing programs for handling data connected with these actions, including the performance of such duties in relation to a computerized litigation support system; and to employees of third-party contractors performing one or more these functions; provided, however, that in all such cases the individual to whom disclosure is be made has signed a form containing:

(1) a recital that the signatory has read and understands this Order;

(2) a recital that the signatory understands that unauthorized disclosures of the stamped confidential documents is prohibited and would constitute a violation of this Order; and

(3) a statement that the signatory consents to be bound by the terms of this Order.

(c) Before disclosing a stamped confidential document to any person listed in subparagraph (a) or (b), *supra,* who is a competitor (or an employee of a competitor) of the party that so designated the document, the party wishing to make such disclosure shall give at least ten (10) days' advance notice in writing to the counsel who designated such information as confidential, stating the names and addresses of the person(s) to whom the disclosure will be made, identifying with particularity the documents to be disclosed, and stating the purposes of such disclosure. A copy of this notice shall also be filed with the Commission. If, within the ten-day period, a motion is

filed objecting to the proposed disclosure, disclosure is not permissible until the Commission has denied such motion.

6. A party (or aggrieved entity permitted by the Commission to intervene for such purpose) may apply to the Commission for a ruling that a document (or category of documents) stamped as confidential is not entitled to such status and protection. The party or other person that designated the document as confidential shall be given notice of the application and an opportunity to respond. To maintain confidential status, the proponent of confidentiality must show by a preponderance of the evidence that there is good cause for the document to have such protection. Parties and other persons shall treat such documents as confidential under this Order until the Commission rules on the application challenging that designation.

7. In the event the Commission orders that depositions may be taken in this proceeding:

(a) A deponent may, during the deposition be shown, and examined about, stamped confidential documents if the deponent already knows the confidential information contained therein or if the provisions of paragraph 5(b) above are complied with. Deponents shall not retain or copy portions of the transcript of their depositions that contain confidential information not provided by them or the entities they represent unless they sign the form prescribed in paragraph 5(b) above. A deponent who is not a party or a representative of a party shall be furnished a copy of this Order before being examined about, or being asked to produce, potentially confidential documents.

(b) Parties (and deponents) may, within fifteen (15) days after receiving a deposition transcript, designate pages of the transcript (and exhibits thereto) as confidential. Confidential information within the deposition transcript may be designated by underlining the portions of the pages that are confidential and marking such pages with the following legend: "Confidential--subject to protection pursuant to Commission Order." Until expiration of the 15-day period, the entire deposition will be treated as subject to protection against disclosure under this Order. If no party or deponent timely designates confidential information in a deposition, then none of the transcript or its exhibits will be treated as confidential; if a timely designation is made, the confidential portions and exhibits shall be filed under seal separate from the portions and exhibits not so marked.

8. Subject to the Federal Rules of Evidence, stamped confidential documents and other confidential information may be offered in the record made by the parties and submitted to the Commission only in this proceeding, and provided that the proponent of the evidence gives five days' advance notice to counsel for the party or other person that designated the information as confidential. Any party may move the Commission for an order that the evidence be received *in camera* or under other conditions to prevent unnecessary disclosure. The Commission will then determine whether the proffered evidence should continue to be treated as confidential information and, if so, what protection, if any, may be afforded to such information in this proceeding.

9. Except as otherwise provided herein, parties or persons obtaining access to stamped confidential documents under this Order shall use the information only for preparation and prosecution of this complaint proceeding (including appeals), and shall not use such information for any other purpose, including governmental, commercial, or other judicial or administrative proceedings.

10. Disclosure of materials described herein shall not be deemed a waiver by the party designating the materials as confidential in any other proceeding, agency or court, of any privilege or entitlement to confidential treatment which could be raised. Parties or persons obtaining access to confidential materials pursuant to this Order (a) agree not to assert any such waiver; (b) agree not to use information derived from any confidential materials to seek disclosure in any other proceeding; and (c) agree that accidental disclosure of privileged information shall not be deemed a waiver of the privilege.

11. If a court or another administrative agency subpoenas or orders production of stamped confidential documents that a party has obtained under the terms of this Order, such party shall promptly notify the party or other person who designated the document as confidential of the pendency of such subpoena or order.

12. Stamped confidential documents need not be filed with the Commission except when required in connection with motions under Sections 1.727 or 1.730 of the Commission's rules or when offered as evidence in this proceeding. If filed, they shall be filed under seal and shall remain sealed while in the Commission offices or such other place as the Commission may designate so long as they retain their status as stamped confidential documents. Unless otherwise directed by the Commission, confidential filings shall be served only on the Commission and the parties to this proceeding and parties that were provided or otherwise obtained access to such confidential information pursuant to paragraph 4 of this Order.

13. Nothing in this Order shall prevent or otherwise restrict counsel from rendering advice to their clients and, in the course thereof, relying generally on examination of stamped confidential documents; provided, however, that in rendering such advice and otherwise communicating with such client, counsel shall not make specific disclosure of any item so designated except pursuant to the procedures of paragraphs 5(b) and 5(c) above.

14. If a document contains information so sensitive that it should not be copied by anyone, it shall bear the additional legend "Copying Prohibited." Application for relief from this restriction against copying may be made to the Commission, with notice to counsel so designating the document.

15. The provisions of this Order shall not terminate at the conclusion of these actions. Within 120 days after final conclusion of all aspects of this litigation, stamped confidential documents and all copies of same (other than exhibits of record, if any) shall be returned to the party or person who produced such documents, or, at the option of the producer (if it retains at least one copy of the same), shall be destroyed. All counsel of record shall make certification of compliance herewith and shall deliver the

same to counsel for the party who produced the documents not more than 150 days after final termination of this proceeding.

16. Nothing in this Order shall prevent any party or other person from seeking modification of this Order or from objecting to discovery that it believes to be otherwise improper.

17. All counsel of record are responsible for employing reasonable measures to control, consistent with this Order, duplication of, access to, and distribution of copies of stamped confidential documents. Parties shall not duplicate any stamped confidential documents except working copies and for filing at the Commission under seal.

18. This Order is issued pursuant to Sections 4(i) and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 208, and the authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective upon its release date.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

License Renewal Application File No. BRH - 880801B7
of Dick Broadcasting
Company, Inc.
for Station WKRR(FM)
Asheboro, North Carolina

MEMORANDUM OPINION AND ORDER AND NOTICE OF FORFEITURE

Adopted: May 26, 1993; Released: June 3, 1993

By the Commission:

I. INTRODUCTION

1. The Commission has before it: (i) a Petition for Reconsideration filed by the North Carolina State Conference of Branches of the NAACP and its local branches and (ii) a Petition for Reconsideration filed by the licensee of WKRR(FM) of our Memorandum Opinion and Order (*Order*), *WINFAS, INC, et al.*, 5 FCC Rcd 4902 (1990). In our *Order*, we concluded that the licensee's failure to comply with the Commission's EEO Rule warranted renewal for less than a full term, subject to reporting conditions and a Notice of Apparent Liability in the amount of $10,000. *See* 47 C.F.R. Section 73.2080. NAACP asserts error in our findings that it lacked standing to file a petition to deny WKRR's renewal application and that the licensee's EEO record did not disclose discrimination. It requests that our *Order* be reconsidered and that the renewal application be set for hearing. The licensee argues that the *Order* is deficient in multiple respects and must be set aside. It requests renewal for a full term without reporting conditions and with elimination or reduction of the forfeiture. For the reasons noted herein, we are unconvinced that reconsideration is justified for either NAACP or the licensee; therefore, our *Order* is affirmed. Further, by this *Order*, we issue a Notice of Forfeiture for $10,000 against Dick Broadcasting Company, Inc. for violation of our EEO Rule.

II. PROCEDURAL MATTERS

2. Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. Section 405, states that any party to an order, decision, report or action by the Commission or any other person aggrieved or whose interests are adversely affected may petition for reconsideration. 47 C.F.R. 1.106; *see also Committee for Community Access v. FCC*, 737 F.2d 74 (D.C. Cir. 1984) (*Community Access*). To qualify as a party, a petitioner for reconsideration of the grant of a renewal application must have filed a valid petition to deny against the application. *See University of North Carolina*, 4 FCC Rcd 2780 (1989) (*WUNC-TV*); *Montgomery County Broadcasting Corporation*, 65 FCC 2d 876 (1977) (*Montgomery*); *Redwood Microwave Association, Inc., Mount Sanhedrin, Pratt Mountain and Mt. Pierce, California*, 61 FCC 2d 442 (1976) (*Redwood*). If the petition for reconsideration is filed by one "who is not a party to the proceeding, it shall state with particularity the manner in which the person's interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding." 47 C.F.R. Section 1.106(b)(1); *Community Access, supra*.

3. In our *Order*, we found that NAACP had not achieved party-in-interest status because its petition did not include a timely filed affidavit or declaration under penalty of perjury from a listener or resident of the station's service area. Moreover, NAACP did not provide any explanation why the declarations were untimely filed. As previously held, we will not acquiesce to late filings without substantial justification. *See Application of Certain Broadcast Radio Stations Serving Communities in the State of Florida*, 3 FCC Rcd 1930 (1988). Thus, NAACP's renewal challenge was properly treated as an informal objection and we affirm our finding. Accordingly, insofar as NAACP's petition requests reconsideration of our standing decision, we deny it. As an informal objector, NAACP lacks standing to bring the instant petition because it is not a "party to the proceeding" within the meaning of Section 405 of the Act and Section 1.106 of our rules.[1] NAACP has not demonstrated that it was adversely affected by our *Order* or that it was not possible for it to participate in the earlier stages of the proceeding. Hence, we find that NAACP has not complied with the procedural requirements of Section 1.106. *See* 47 C.F.R. Section 1.106; *WUNC-TV, supra; Montgomery, supra; Redwood, supra*. Therefore, insofar as NAACP's petition requests reconsideration on the merits, its petition for reconsideration will be dismissed.[2]

III. BACKGROUND

4. In our *Order*, we concluded that the licensee of WKRR(FM) did not make positive and continuing efforts to recruit minorities based on the record before us. Specifically, we found that for 22 full-time, 17 upper-level, positions filled between April 1985 and May 1988, the licensee recruited for only ten of 22 hires. The recruitment consisted of contacting a communications publication for three upper-level jobs, advertising nationally for one upper-level job, using a search firm for one upper-level job, and using five other sources to recruit for five additional positions. Minority sources were used in only three instances and minorities were present in only three applicant pools. No minorities were hired, and no minorities were employed by the station, despite the fact that the local workforce in-

[1] In its petition for reconsideration, NAACP states that although it untimely filed the declaration of an official of the North Carolina State Conference of Branches of the NAACP, "the NAACP is so well known and established in North Carolina that official notice should have been taken of the NAACP's vast membership and entitlement to standing." We find no merit to this argument.

[2] We have nevertheless reviewed NAACP's petition and note that it does not alter our prior conclusions.

cluded 17.8% minorities. Lastly, we determined that the licensee conducted inadequate self-assessment of its program.

5. The licensee presents several arguments in support of its request for reconsideration. Initially, the licensee contends that the Notice of Apparent Liability for Forfeiture was barred by Section 503(b)(6) of the Communications Act, as amended, 47 U.S.C. Section 503(b)(6), and by Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, because "the Notice unlawfully rests forfeiture upon conduct occurring over a three-year period of which but nine months took place more than three years prior to the date of the Notice." Second, the licensee argues that because Section 73.2080(c)(2) of the Commission's rules, 47 C.F.R. 73.2080(c)(2), was adopted on August 17, 1987, its conduct prior to the effective date of the rule "may not form the basis for a forfeiture." Third, the licensee charges that the *Order* fails to comply with Commission rule 1.80(f)(1), 47 C.F.R. 1.80(f)(1), because it does not "set forth with specificity the acts or omissions ... which give rise to the purported rule violations." Lastly, the licensee asserts that Commission rule 73.2080(c)(2) does not require specific employment related actions, but allows for the "exercise of licensee discretion and judgement." Thus, it argues that it cannot be held in violation of the rule and sanctioned simply because the Commission "believes it could have done more." The licensee requests reconsideration of our *Order* and elimination of the sanctions.

IV. DISCUSSION

6. Reconsideration is appropriate where the petitioner shows either a material error or omission or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters. *See WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); 47 C.F.R. Section 1.106(c). Based on this standard, we find reconsideration of the *Order* inappropriate for the reasons discussed herein.

7. The licensee's first argument -- that our sanctions were barred by the statute of limitations provisions in 47 U.S.C. Section 503(b)(6) and 47 C.F.R. 1.80(c)(1) -- is not correct. In pertinent part, Section 503(b)(6) states:

> No forfeiture penalty shall be determined or imposed against any person under this subsection if --
>
> (A) such person holds a broadcast station license issued under title III of this Act and if the violation occurred --
>
> (i) more than 1 year prior to the date of issuance of the required notice or notice of apparent liability; or
>
> (ii) prior to the date of commencement of the current term of such license,
>
> whichever is earlier *so long as such violation occurred within 3 years prior to the date of issuance of such required notice* (emphasis supplied).

47 U.S.C. 503(b)(6).

Section 1.80(c)(1) of the Commission's rules states that "... no forfeiture penalty shall be imposed if the violation occurred more than 3 years prior to the date on which the notice of apparent liability ... is issued." While the *Order* properly discussed the entire license term in order to determine the necessity for designation for hearing, short-term renewal or reporting conditions, the licensee is correct that based on release of our *Order* on August 10, 1990, the relevant three-year statute of limitation would extend from August 10, 1987, to August 10, 1990. As discussed in greater detail below, the licensee's continuing violations during this period fully justify a $10,000 forfeiture.

8. From August 10, 1987, to May 10, 1988 (the period during the statute of limitations for which we have employment data), the licensee made six full-time hires. For one lower-level position, it contacted Winston-Salem State and the University of North Carolina-Greensboro and attracted one Black female applicant. She was not hired and there is no record of an interview. For another lower-level job, recruitment was limited to over-the-air announcements on WKRR-FM and there were no minority applicants. For the remaining four positions, the licensee did not recruit and did not attract any minority applicants. The lack of affirmative recruitment clearly demonstrates the licensee's continuing failure to conduct a positive program of EEO efforts. Moreover, these hires indicate non-compliance during the statutory period, which mirrors the licensee's employment efforts throughout the license term. Taken as a whole, the licensee's EEO program during the August 10, 1987, to May 10, 1988 period manifests a continuing pattern of conduct which did not comply with our rules. Further, the record during this period provided no indication that the licensee assessed its program and made modifications which would have improved its performance during the statutory period. Inasmuch as the violations occurred throughout the statutory period, we deem that the *Order* complied with Section 503(b)(6) of the Act, and properly issued an NAL for acts and omissions within the mandated statute of limitations.

9. We also reject the licensee's second argument, which challenges our authority to find the licensee in violation of rule provisions which we adopted in April 1987 and which became effective in August 1987. *See Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (*Broadcast EEO*), *petition for recon. pending; see also* 4 FCC Rcd 1715 (1989) (request for clarification by National Association of Broadcasters). Notwithstanding its amendment, our EEO Rule, effective during WKRR's entire license term, always required that licensees afford equal opportunities for employment regardless of race or sex. The Commission has required broadcast licensees to refrain from employment discrimination and establish and maintain an affirmative action program for qualified minorities and women since 1970. *See Nondiscrimination Employment Practices of Broadcast Licensees*, 23 FCC 2d 430 (1970). The changes in the rule made in *Broadcast EEO* did not alter the basic requirements of the then existing EEO Rule; it is these basic requirements that the licensee violated. The amendment to the rule merely stated that the Commission would focus its evaluation more on the licensee's good faith efforts than on statistical analysis. As we stated then: " ... in deciding to include specific EEO requirements in our broadcast rules, it is our intention not to alter the broadcasters' current EEO obligations .... " *Id.* at 3969. In any event, our for-

feiture action against the licensee is premised on conduct occurring from August 1987 to May 1988, a period which by the licensee's own contention was covered by the revised rule.

10. Thirdly, we reject the licensee's assertion that the *Order* lacks the specificity required by Commission rule 1.80(f)(1) because it is confused about which of its following shortcomings constitutes a rule violation: 1) failure to have Blacks in every applicant pool; 2) failure to use minority sources for every vacancy; or 3) failure to recruit for "12 of 22 hires". Section 1.80(f)(1) requires that the content of the notice of apparent liability identify the rule violated, the act or omission charged against the respondent and the facts thereto, the date of the conduct and the amount of the forfeiture penalty. In our *Order* we stated that the $10,000 forfeiture was based on the licensee's "repeated failures to contact potential sources of minority applicants as required by Section 73.2080(c)(2) of the Commission's Rules .... " The rule provides that as part of an EEO program the licensee should reasonably address its attention to use of potential sources of female and minority applicants to supply referrals "whenever job vacancies are available". We determined that, during the license term, the licensee did not "demonstrate any nexus between its claimed minority recruitment contacts and particular job hires," and that it recruited for only 10 of 22 hires. Moreover, our examination of the record led us to conclude that the licensee's self-assessment for most of the license term was inadequate. It is clear that the *Order* identified the Commission EEO Rule violated, reasons why we determined that violations occurred and the period of time during which the violations occurred. In our view, the *Order* meets the standard of Section 1.80(f)(1) regarding the content of notices of apparent liability.

11. Lastly, the licensee disputes that Section 73.2080(c)(2) requires specific action regarding female and minority recruitment. It is clear from our rule that the Commission requires each licensee to develop, maintain and assess an EEO program for women and minorities. In articulating those requirements, however, we have acknowledged the diversity among broadcasters. We said in *Broadcast EEO*, 2 FCC Rcd 3967 (1987):

> As written, the rules plainly indicate that the specific program elements, including those relating to the station's self-evaluation of its EEO profile, are intended to serve only as *examples of the types of activities that would fulfill the EEO requirements* ... each licensee must determine the most appropriate means of carrying out its EEO program based on the characteristics of the station and its local service area.

Id. at 3969.

Thus, our EEO Rule attempts to provide guidance in describing some reasonable components of an effective EEO program. How licensees develop and define their recruitment sources is a matter within their discretion. However, at a minimum, an affirmative program should demonstrate a diversity of sources being contacted for each vacancy or the presence of minorities in applicant pools. In those circumstances where broadcast licensees do not exhibit reasonable efforts and have not utilized any of our suggested recruitment methods, a valid question of noncompliance is raised. As we stated in *Applications of Certain Broadcast Stations Serving Communities in the State of South Carolina*, 5 FCC Rcd 1704 (1990):

> While we believe the use of minority referral sources is an important step in a licensee's efforts to obtain minority referrals and applicants, use of such specific sources is merely one of several steps that can be taken to achieve a meaningful pool of minority referrals and applicants. In fact, it is possible for a licensee to have sufficient minority referrals and applicants without using minority specific sources. Thus, if a licensee obtains a meaningful pool of referrals and applicants from, *e.g.*, exclusive reliance on general sources, it will not be faulted for failing to contact minority specific sources. On the other hand, where a licensee does not obtain meaningful results from general sources and the licensee also has failed to contact minority specific sources, questions will be raised concerning the extent to which the licensee has engaged in adequate efforts to obtain minority applicants.

Id. at 1709 n.8.

Therefore, the licensee's limited recruitment contacts and lack of self-assessment, joined with its failure to adopt any of our suggested methods for meeting its EEO obligations, indicate inadequate efforts to attract and hire qualified minority candidates.

12. In the same context, the licensee argues that our EEO Rule only requires that its program "reasonably" address minority recruiting, regardless of whether the Commission "believes it could have done more." Our review of the licensee's recruitment efforts indicates an EEO program which was not "reasonable" under the circumstances. Despite its location in an area with a 17.8% minority labor force,[3] the licensee attracted minorities into its applicant pool for only three jobs. Those minority applicants came as a result of its use of minority referral sources for only three positions. Moreover, none of the candidates for an upper-level position was a minority. As further evidence of the licensee's lackluster efforts, the record reveals that the licensee considered only one applicant for nine of the 22 hires and the licensee recruited for only 10 of 22 (45%) of its hires. We also found WKRR's self-assessment inadequate for most of the license term. Thus, it was unable to make positive modifications in its outreach efforts. Moreover, as discussed above, the violations continued during the period within the statute of limitations for forfeitures.

V. CONCLUSION

13. Pursuant to Commission rule 1.106, we find NAACP has no standing to petition for reconsideration of our *Order* because it failed to show why it did not file a valid petition to deny WKRR's renewal application and was not a party to the renewal challenge. In addition, after taking into

[3] Asheboro is located in Randolph County, which is part of the Greensboro Winston Salem-High Point MSA. That MSA's labor force is 45.3% women and 17.8% minorities (16.8% Blacks).

account the licensee's arguments, we find that our original decision renewing WKRR's license for a short-term subject to reporting conditions and a Notice of Apparent Liability for forfeiture in the amount of $10,000 was appropriate. Accordingly, we deny the licensee's petition for reconsideration, affirm our renewal of its license for a short-term subject to reporting conditions and issue a Notice of Forfeiture in the amount of $10,000.

VI. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by the North Carolina State Conference of Branches of the NAACP and its local branches IS DISMISSED IN PART and DENIED IN PART.

15. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by Dick Broadcasting Company, Inc., licensee of WKRR(FM) IS DENIED and its renewal grant remains effective for a short-term and subject to reporting conditions, and pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b), that Dick Broadcasting Company, Inc. FORFEIT to the United States the sum of ten thousand dollars ($10,000) for the wilful and repeated violation of Section 73.2080 of the Commission rules, 47 C.F.R. Section 73.2080. Payment of the forfeiture may be made by mailing to the Commission a check or different instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's rules and Section 504(a) of the Communications Act of 1934, as amended, as summarized in the attachment to this Order.

16. IT IS FURTHER ORDERED that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order to all parties.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone & Telegraph Co. — File Nos. USP-93-W-056
MCI Telecommunications Corp. — USP-93-W-057

Petitions for Waiver of the International Settlements Policy for a Change in the Accounting Rate for Switched Voice Services with Mexico

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: May 21, 1993; Released: June 4, 1993

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On January 13, 1993, American Telephone and Telegraph (AT&T) filed a petition for waiver (*AT&T Waiver)* of the Commission's International Settlements Policy (ISP)[1] to permit a change in the settlement rates for switched voice service (IMTS) between AT&T in the United States and Telefonos de Mexico, S.A. de C.V. (Telmex) in Mexico. On January 19, 1993, MCI Telecommunications Corporation (MCI) filed a similar waiver (*MCI Waiver)* of the Commission's ISP to permit a change in the settlement rates for IMTS between MCI and Telmex. On February 3, 1993, the Common Carrier Bureau staff sent a letter to both AT&T and MCI, stating that grant of the waivers may not serve the public interest, that further information was required, and that both companies must await formal staff action before the proposed modification could be implemented.

II. SUMMARY OF WAIVER REQUESTS

2. In their waiver requests, both AT&T and MCI seek to implement changes in the IMTS settlement rates in accordance with formulae stated in various agreements negotiated by the carriers. Specifically, AT&T seeks to implement certain reductions in the International Long-distance (ILD) and International 800 (I-800) settlement rates in accordance with formulae stated in a 1989 Memorandum of Agreement between AT&T and Telmex (ILD Agreement),[2] an International 800 Service Memorandum of Agreement (I-800 Agreement),[3] and amendments thereto.[4] MCI's ILD and I-800 agreements are similar to AT&T's, and the proposed rates are identical.[5] Both parties assert that the proposed settlement rates for ILD and I-800 are in the public interest because they will move the rates closer to cost, consistent with the formula contained in the ILD Agreement and the I-800 Agreement, and because they will reduce the U.S. net settlements outpayment.

3. In addition, both parties request a waiver of the ISP to introduce USADirect and CALL USA calling options[6]

---

[1] The ISP requires uniform settlement rates, accounting rates and division of tolls for U.S. international carriers on parallel routes. *See Implementation and Scope of Uniform Settlements Policy for Parallel International Communications Routes,* 51 Fed. Reg. 4736 (1986) *(ISP Order); Reconsideration,* 2 FCC Rcd 1118 (1987); *Further Reconsideration,* 3 FCC Rcd 1614 (1988). In 1991 the Commission reformed the ISP to encourage and facilitate accounting rate reductions by U.S. carriers. *See Regulation of International Accounting Rates,* 6 FCC Rcd 3552 (1991) *(Phase I Report and Order); Reconsideration,* 7 FCC Rcd 8049 (1992).

[2] The ILD Agreement provides for a classified settlement structure that includes four categories of ILD traffic, with each category sub-divided into eight geographic rate zones based on distance from the U.S.-Mexico border. The categories of ILD traffic include dial day, dial night, station and person-to-person.

The ILD Agreement calls for an annual reduction in the combined average settlement rate per minute (ASPM) paid by each U.S. carrier to Telmex by the greater of either $.035, or 50% of the net settlements growth divided by the number of outgoing minutes of traffic for the previous year. These reductions are applied to the various classes and geographic rate zones as negotiated by the two carriers. For each carrier, this formula would apply until the ASPM paid by the carrier to Telmex reached $.60, at which time "a new agreement will be signed to achieve settlement rate parity at a specific date in the future." *See* ILD Agreement. The ASPM for year-ending 1991 was $.731. Under AT&T's ILD Agreement, Telmex also agreed to offer initial USADirect service from four cities in Mexico.

[3] The I-800 agreement establishes four geographic rate zones, and links the settlement rates for the service to the effective per-minute traffic weighted average ILD settlement rates. A July 1992 revision to AT&T's I-800 Agreement renders that agreement effective only as long as the ILD Agreement remains effective.

[4] The amendments entered into by the parties were subject to the ISP because a) each agreement amending the ILD Agreement and the I-800 Agreement constitutes an amendment to an operating agreement under which the parties were already providing switched voice service between the United States and Mexico, b) other carriers are providing the same or similar services between the United States and Mexico, and c) each amendment relates to the exchange of services, interchange or routing of traffic and matters concerning rates, accounting rates, division of tolls, or the basis of settlement of traffic balances. *See* 47 C.F.R. § 43.51(d)(2) (1991). Because the amendments are not simple reductions in the accounting rate, the parties were required to file a waiver of the ISP. *See* 47 C.F.R. § 64.1001(c) (1991).

[5] Unless otherwise stated, "ILD Agreement" and "I-800 Agreement" will refer to both AT&T's and MCI's agreements with Telmex.

[6] USADirect and CALL USA are country-direct calling options that enable a caller, using a phone in another country, to call a toll-free number and be connected with a U.S. operator in the United States. That operator, in turn, forwards the telephone call to its U.S. destination. The caller is billed monthly for the calls. For each minute of USADirect or CALL USA traffic, the U.S. carrier owes a settlement payment to the foreign correspondent.

throughout Mexico at the following settlement rates:[7]

Telmex Rate Band	Effective 12/1/92 through 12/31/93
1-3	$.35 per minute
4-8	$1.20 per minute

AT&T asserts that the proposed settlement agreement for USADirect is in the U.S. public interest because it will reduce the U.S. settlements outpayment and provide a more convenient, less expensive calling option to U.S. travelers and expatriates in Mexico. AT&T asserts that the proposed agreement will reduce the U.S. settlements outpayment to Mexico by more than $22 million in 1993, largely as a result of callers within Mexico employing USADirect service in lieu of receive-collect calling.[8]

4. Under the ILD Agreement, AT&T notes, all calls billed in the U.S. that require the intervention of an operator are settled using the station or person-to-person rate (depending on the customer's choice of service), regardless of which administration's operator is used. Thus, AT&T pays the same settlement rates to Telmex for a station call that is made from the U.S. using a U.S. operator to complete the call in Mexico as it does for a station collect call from Mexico using a Mexican operator to complete the call in the U.S.[9] AT&T states that the proposed rates for USADirect, which involves the assistance of a U.S. operator, are designed to yield an average settlement rate per minute equal to the average settlement rate of operator station calls. Thus, AT&T argues, the proposed rates under the USADirect agreement initially are consistent with the structure existing under the ILD Agreement. By calling for annual reductions in the settlement rates applicable to USADirect calls through 1997, AT&T argues, the agreement allows the settlement rates for USADirect service to achieve parity with the average settlement rates for dial calls by 1998.[10]

5. MCI supports AT&T's waiver, and adds that "the establishment of MCI CALL USA service in Mexico is in the U.S. public interest in that it will ensure U.S. consumers and business persons traveling throughout Mexico reliable service and prompt connection to an English speaking operator for completion of a call from any originating location in Mexico."[11] MCI states that CALL USA would allow MCI to compete with AT&T's USADirect service between the U.S. and Mexico, "clearly providing the benefits than an additional competitor brings to the U.S. public."[12]

III. DISCUSSION

6. In this order, we find that it is in the public interest to grant AT&T's and MCI's request for a waiver of the ISP to provide ILD and I-800 service at the proposed settlement rates.[13] We find, however, that the provision of USADirect and CALL USA throughout Mexico at the proposed settlement rates for those service options would not be in the public interest. We accordingly deny that portion of AT&T's and MCI's waiver requests that propose new settlement rates for USADirect and CALL USA service. Specifically, neither carrier has borne the burden of proof that a waiver of the ISP for a higher, non-uniform IMTS accounting rate for USADirect or CALL USA service with Mexico is in the public interest.[14]

A. Dial, Station, Person-to-Person and International 800 Service

7. We agree with both carriers that the proposed changes in the ILD and I-800 rates are in the public interest, inasmuch as they, *inter alia*, constitute reductions in the settlement rate, bring the accounting rate closer to cost, serve to reduce the net settlements deficit from what it otherwise might have been and will lead to the renegotiation of the ILD Agreement with Telmex. While recognizing that the ILD Agreement mandates non-cost-based surcharges for station and person-to-person calls,[15] we note that the issue of whether the ILD Agreement complies with present Commission policy is not before us. The only issue before us regarding the ILD service options is the legality of the amendments to that agreement. In this context, we note AT&T's statement that the ILD Agreement is likely to expire by its terms by year end 1994, and that the terms of any new agreements have not yet been negotiated. We will have ample opportunity to examine the structure of any new agreements, which will be filed with this Commission, for consistency with our ISP (including 50/50 split of accounting rates), and with our determination that accounting rates should be cost-based.[16]

B. USADirect and CALL USA Service.

---

[7] In 1992 AT&T paid a settlement rate of $1.10 per minute (day) and $.74 per minute (night) for the limited USADirect service authorized from four cities under the 1989 Agreement. These rates were equivalent to the dial day and dial night settlement rates paid by AT&T in 1992.

[8] *See AT&T Waiver* at 1.

[9] A $2.00 per call surcharge is payable to the non-billing administration whose operator is used to complete a collect call.

[10] *See* Letter, dated February 16, 1993, from Elaine McHale, Senior Attorney, AT&T, to Donna R. Searcy, Secretary, Federal Communications Commission.

[11] *MCI Waiver* at 2.

[12] *Id.*

[13] Under normal circumstances, a waiver request would posit a change in an existing accounting rate between a U.S. carrier and a foreign administration. Most accounting rate arrangements provide that the two correspondents split the accounting rate 50/50. *See Regulation of International Accounting Rates,* Phase II, Second Report and Order and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 8040 n.3 (1992) (*Phase II Second Report and Order)* In the present case, however, the existing agreement between U.S. carriers and Telmex posits unequal "settlement rates" to be paid by one carrier to the other. "Settlement rate" as used here can be defined as payment for a minute of IMTS traffic billed in the United States and terminated by Telmex. In the existing settlement agreement, there are many settlement rates which vary among service classifications, by mileage bands or by areas within a service classification. *See supra* notes 2 and 3.

[14] Under Commission policy, the petitioner bears the burden of demonstrating that a waiver of the Commission's ISP is in the U.S. public interest. *See, e.g., Phase I Report and Order,* 6 FCC Rcd at 3554-5 (1991).

[15] For instance, under the ILD Agreement, each carrier must pay Telmex a surcharge for use of the carrier's own operator. In addition, even where a Mexican operator is used, the ILD Agreement requires payment for an operator service on a per-minute basis, rather than a one-time payment that arguably is a more accurate measure of the costs incurred.

[16] *See Phase I Report and Order, supra* note 1.

8. With regard to USADirect and CALL USA calling options, neither AT&T nor MCI provides evidence of Commission precedent to distinguish USADirect or CALL USA from traditional IMTS for purposes of the ISP. As a result, under existing Commission policy and ISP procedures, the Bureau must treat the AT&T and the MCI calling options as ordinary IMTS from Mexico.[17] Since the proposed rates are higher than the ILD rates for Mexico, we must treat the AT&T and MCI filings as requests for waiver of the Commission's ISP to permit a higher, non-uniform, non-cost-based IMTS accounting rate for USADirect and CALL USA.

9. In its *Phase I Report and Order*, the Commission delegated authority to the Bureau "to consider, on a case-by-case basis, granting ISP waiver requests that include a lower, more economically efficient, cost-based, international accounting rate when supported by a sound analysis of the benefits that will result from the implementation of that rate."[18] The Commission stated that the Bureau should approve accounting rate changes if the changes resulted in a) a more cost-based accounting rate, and b) either a commitment to lower calling prices or some other public interest benefit.[19] The Commission stated, however, that "under our waiver option we would expect to deny certain types of waiver requests, such as non-cost-based increases in, or surcharges to, the accounting rate... ."[20]

10. Neither AT&T's nor MCI's proposed settlement rates for USADirect and CALL USA satisfy this standard for approval, since both constitute "non-cost-based increases in" the accounting rate with Mexico. For instance, the agreement would permit AT&T and Telmex to increase the settlement rate for USADirect service in Telmex Rate Band 8 from $1.10 per minute (day) or $.74 per minute (night) (which was also the dial rate) to $1.20 per minute. In addition, the settlement rates proposed by AT&T and MCI for USADirect and CALL USA service throughout Mexico constitute an increase in the IMTS settlement rates with Mexico, because they exceed, on average, the corresponding rates for subscriber-dialed calls from the U.S. to Mexico.

11. The carriers do not deny that implementation of the proposed rates for USADirect and CALL USA would constitute an increase in the IMTS settlement rates in Rate Band 8. Rather, the carriers argue that although the proposed rates for USADirect and CALL USA throughout Mexico exceed on average the settlement rates for dial service, they do not exceed on average the corresponding rate for station traffic. They argue that the proposed rates are consistent with the structure existing under the ILD Agreement -- i.e. that all operator assisted calls billed in the U.S. are settled at either station or person-to-person rates. As such, they suggest, the proposed rates for USADirect and CALL USA traffic are not higher than the ILD rates, and the Commission should not treat the proposed rates as non-cost-based increases in the IMTS accounting rate.

12. We conclude that implementation of the proposed settlement rates would constitute an increase in the IMTS accounting rate. First, the rates are higher than the existing USADirect rates with Telmex in Rate Band 8, where a direct comparison is possible. Moreover, given that the settlement rates paid by AT&T for USADirect service in Rate Band 8 are the same as the settlement rate for dial traffic originating in the United States and terminating in Rate Band 8, we believe that the carriers would be hard pressed to justify, on the basis of cost, the introduction of a settlement rate for USADirect and CALL USA that is higher than the rate for dial traffic.[21] In any event, the carriers have made no attempt to so justify the proposed rates. We cannot accept the introduction of an IMTS calling option with a higher, non-cost-based accounting rate on the basis that the existing accounting rate structure already includes non-cost-based accounting rates, regardless of how irregular the existing rate structure is.[22]

13. We note that we have previously rejected the implementation of USADirect and CALL USA at higher, non-cost-based accounting rates. In our *Telefonica*[23] decision, for example, AT&T requested a waiver to change the accounting rate for USADirect to a higher amount.[24] MCI requested a waiver to match that amount. We found that any benefit from USADirect or CALL USA at a higher, non-cost-based accounting rate would inure to only a small class of U.S. ratepayers, that the higher rate would allow Spain to whipsaw U.S. carriers, that the higher rate was not cost justified, and that the higher payment to Spain was not justified given the above-cost accounting rate with Spain. Based on these concerns, we rejected the accounting rate change and reaffirmed our "intention to implement Commission policy to preclude the introduction of higher, non-uniform, international accounting rates that exceed the cost of providing service."[25]

14. In this case, neither carrier has discussed how the proposed changes would help customers in the U.S., for instance, by leading to a reduction in U.S. or foreign collection rates. As in *Telefonica*, it appears that the only benefit will inure to a very small class of U.S. ratepayers -- that is, U.S. residents or travelers in Mexico. In addition, neither AT&T nor MCI has attempted to justify, on the basis of cost, the implementation of higher settlement rates for USADirect or CALL USA than for other IMTS service, or the implementation of rates higher than the existing USADirect rates in Rate Band 8.

---

[17] *See e.g. American Telephone and Telegraph Company*, 7 FCC Rcd 2186, 2187 (Com. Car. Bur. 1992) (*United Arab Emirates)*. The Commission has made clear that the ISP is "designed to deal with a market situation and not a particular technology or service type." *See ISP Order*, at para. 35.

[18] *Phase I Report and Order*, 6 FCC Rcd at 3554.

[19] *Id.* In addition, the Commission made clear its intention to continue using the ISP to prevent whipsawing of U.S. carriers. *See id.* at 354, 355.

[20] *See id.* at n.30.

[21] Indeed, AT&T appears to recognize that it would be difficult to make such a cost distinction in its agreement with Telmex to reduce the rates for USADirect in subsequent years, so as to eventually equal dial rates.

[22] With very few exceptions, no other accounting rate arrangements between U.S. carriers and foreign correspondents have different accounting rates for dial, station and person-to-person IMTS traffic where the billing party uses its own operator for station and person-to-person calls.

[23] *See American Telephone and Telegraph Company and MCI Communications Corporation*, 5 FCC Rcd 4618 (Com. Car. Bur. 1990) (*Telefonica)*.

[24] AT&T requested a waiver to change the accounting rate for USADirect from 1.6 Special Drawing Rights (SDR) per minute for peak calls and 1.2 SDR per minute for off-peak calls (the same as the ILD rate) to 1.95 SDR per minute for peak calls and 1.55 SDR per minute for off-peak calls.

[25] *Telefonica*, 5 FCC Rcd at 4621.

15. Although both carriers state that approval of these settlement rates would result in a significant decrease in the U.S. net settlements deficit with Mexico,[26] we are not convinced that this is so.[27] In any event, the *Phase I Report and Order* makes clear that such a decrease is not the Commission's only criterion for approval of an accounting rate change. In our view, the record does not demonstrate that permitting the introduction of a higher, non-cost-based IMTS accounting rate with Mexico would improve the settlements deficit with Mexico or would otherwise be in the U.S. public interest.

IV. CONCLUSION

16. We find that the proposed changes in the ILD and I-800 settlement rates between AT&T and Telmex, and between MCI and Telmex, are in the public interest because they constitute reductions which bring the accounting rate closer to cost, will likely reduce the U.S. net settlements deficit with Mexico below what it might otherwise have been, and will lead to a renegotiation of the ILD Agreement with Telmex. For the reasons stated above, however, we deny the waiver requests of AT&T and MCI to introduce a USADirect and CALL USA option, respectively, at a higher, non-uniform accounting rate. We do not believe that the benefits of introducing USADirect and CALL USA into Mexico outweigh the costs of allowing the introduction of a higher, non-cost-based surcharge for IMTS service.[28]

V. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED that AT&T and MCI petitions, File Nos. USP-93-W-056 and USP-93-W-057, for waiver to permit the proposed changes in the settlement rates with Mexico are GRANTED in part, and AT&T and MCI may implement the proposed IMTS settlement rates for ILD and I-800 service options with Mexico.

18. IT IS FURTHER ORDERED that AT&T and MCI shall not implement the proposed IMTS settlement rates for USADirect and CALL USA service options with Mexico, respectively.

19. IT IS FURTHER ORDERED that AT&T shall not settle with Telmex for the provision of USADirect calling option in Rate Band 8 at a rate higher than the current rate for that option.

20. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (*see* 47 C.F.R. Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

---

[26] Given the traffic imbalance between the U.S. and Mexico and the above-cost accounting rate, moreover, it is not surprising that Mexico is the recipient of the largest outflow of settlements payments from the United States. The U.S. net settlements deficit with Mexico was $615 million in 1991. *See International Communications Traffic Data Report for 1991*, Common Carrier Bureau/Industry Analysis Division (December 1992).

[27] We have seen no persuasive evidence that implementation of the proposed settlement rates for USADirect and CALL USA would result in a decrease in the net settlements payments to Mexico. It is possible that, as AT&T argues, some customers might substitute USADirect and CALL USA calls for collect calls from Mexico. However, AT&T appears to recognize that USADirect will primarily stimulate incremental traffic from customers who would not otherwise make IMTS calls. *See e.g.*, Reply Comments of AT&T on Further Notice of Proposed Rulemaking in CC Docket No. 90-337, Phase II, at n.10. Moreover, some customers may substitute USADirect service for dial or station calls from Mexico, which otherwise would have resulted in settlement payments from Telmex to U.S. carriers. Finally, since the proposed settlement rate for Rate Band 8 in Mexico is higher than the settlement rates that are now in effect, implementation of the proposed rates for this area will, alone, increase the settlement outpayments. We cannot conclude, therefore, that the proposed rates for USADirect and CALL USA will lower the net settlements deficit with Mexico.

[28] In the interim, however, we expect that service not inconsistent with this order will be provided on an uninterrupted basis, and that the carriers will resubmit settlement rates for USADirect and CALL USA at subscriber-dialed rates or their equivalent.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PanAmSat, L.P. File No. CSS-88-003(M)

Application for Modification
of Conditional Authority to
Construct, Launch and Operate
a Hybrid Separate International
Communications Satellite System
(PAS-2)

MEMORANDUM OPINION,
ORDER AND AUTHORIZATION

Adopted: May 11, 1993; Released: June 4, 1993

By the Commission:

I. INTRODUCTION

1. PanAmSat, L.P. (PAS, L.P.) has filed the above-captioned application for modification of its conditional authorization, granted to PAS on July 25, 1985, to construct an international communications satellite system.[1] We placed the application on public notice on April 13, 1988. ORI, Inc. (ORI) submitted comments, requesting that the Commission condition grant of the modification on PAS' agreement to certain technical limitations.[2] On January 31, 1989, PAS filed an amendment to its application for modification.[3] For the reasons set forth below, we grant PAS, L.P.'s modification request, as amended, and temporarily assign PAS-2 as a hybrid satellite to the 43^0 West Longitude (W.L.) location.

II. BACKGROUND

2. PAS, L.P. currently operates a hybrid spacecraft -- which transmits on both C-band (4/6 GHz) and Ku-band (11/14 GHz) frequencies -- in the Atlantic Ocean Region (AOR) at 45^0 W.L. PAS, L.P. also is conditionally authorized to construct, launch and operate a second spacecraft, PAS-2, to serve the AOR.[4] By this application, as amended, PAS, L.P. seeks to modify its conditional authorization in order to locate and operate PAS-2 at 43^0 W.L. on C-band and Ku-band frequencies.

3. In the *PAS Order* the Commission conditionally authorized PAS to operate its AOR system (consisting of PAS-1 at 45^0 W.L. and PAS-2 at 57^0 W.L.) on C-band frequencies for service within South America, and in the 6.4-6.9 GHz and 10.7-11.2 GHz frequency bands for service between the United States and Latin America.[5] Subsequently, PAS received Commission consent to acquire Cygnus Satellite Corporation (Cygnus), including Cygnus' conditional authorizations to construct and operate two Ku-band satellites, to be located at 43^0 W.L. and 45^0 W.L.[6] In authorizing the proposed transfer of control, the Common Carrier Bureau required that PAS conform its proposed AOR system to the Commission's policy of initially assigning an entity only two orbital positions in a given frequency band.[7] PAS subsequently requested that the Commission terminate its assignment to 57^0 W.L., effective as of the date of consummation of the proposed transfer of control.[8] The Commission accepted PAS' request to terminate the 57^0 W.L. orbital assignment, which effectively resulted in PAS holding authorizations for a hybrid satellite at 45^0 W.L., an 11/14 GHz satellite at 43^0 W.L., and a hybrid satellite with no specified orbital location.[9] The Commission therefore directed PAS to clarify its plans for a second space station facility in the AOR.[10]

---

[1] *Pan American Satellite Corporation*, 101 FCC 2d 1318 (1985) (*PAS Order*). On December 31, 1992, the Common Carrier Bureau consented to the assignment by Alpha Lyracom, d/b/a Pan American Satellite (PAS) of its international space station authorizations, including its conditional authorization for PAS-2, to PanAmSat, L.P. (PAS, L.P.) *See Alpha Lyracom, d/b/a Pan American Satellite, Alpha Lyracom Space Communications, Inc., Cygnus Satellite Corp.*, 8 FCC Rcd 376 (Com. Car. Bur. 1992). The assignments were consummated on the same day. *See* Letter, dated December 31, 1992, from Joseph A. Godles, Attorney for PanAmSat, L.P. to Donna R. Searcy, Secretary, Federal Communications Commission. PAS filed an amendment to the present application on December 9, 1992, requesting that the name of the applicant be changed to PanAmSat, L.P. *See* File No. CSS-003-(M). Accordingly, the consent contained herein for modification of the PAS-2 conditional authorization is granted to PAS, L.P.

[2] By Order released June 13, 1991, the Commission dismissed the application of ORI's successor-in-interest, ARC Professional Services Group, Inc., for authority to construct, launch and operate NASA's C-band TDRS satellite at 41^0 W.L., based on NASA's award of the capacity to Columbia Communications Corporation. *ARC Professional Services Group, Inc.*, 6 FCC Rcd 3544 (1991). Given NASA's decision to award the capacity to Columbia, ORI is no longer a party in interest, and we accordingly disregard its comments.

[3] We placed the amendment on Public Notice March 1, 1989. *See* Report No. I-6302.

[4] Additionally, PAS, L.P. is conditionally authorized to construct, launch and operate PAS-4 in the Pacific Ocean Region (POR), *Pan American Satellite*, 6 FCC Rcd 5132 (1991), and PAS-6 and PAS-7 in the Indian Ocean Region (IOR), *Pan American Satellite*, 7 FCC Rcd 2974 (1992); *Pan American Satellite*, 7 FCC Rcd 4277 (1992).

[5] *See PAS Order*, 101 FCC 2d at 1320, 1336.

[6] *Pan American Satellite Corporation*, 2 FCC Rcd 441 (Com. Car. Bur. 1987).

[7] *Id.* at 442.

[8] *See Pan American Satellite Corporation*, 3 FCC Rcd 677 (1988).

[9] *Id.* at 678. PAS has notified the Commission that its acquisition of Cygnus was consummated on May 6, 1988, thus satisfying the condition to PAS' surrender of the orbital location. *See* Letter, dated June 6, 1988, from Jeffrey H. Olson, Attorney for Alpha Lyracom d/b/a Pan American Satellite, to H. Walker Feaster, III, Secretary, Federal Communications Commission. In this Order, therefore, we reaffirm that PAS' assignment to the 57^0 W.L. orbital location is terminated.

[10] *Pan American Satellite Corporation*, 3 FCC Rcd at 679.

4. In the present application, which PAS filed in response to the Commission's directive, PAS, L.P. proposes to operate PAS-2 as a hybrid (C-band and Ku-band) spacecraft at the 43^0 W.L. orbital slot it acquired from Cygnus. According to PAS, L.P., PAS-2 will be capable of full frequency reuse at both C-band and Ku-band, unlike PAS, L.P.'s initial AOR satellite. PAS, L.P. also states that PAS-2 will make use of state-of-the-art improvements in satellite technology developed since the design and construction of PAS-1. PAS-2 would be capable of operating forty-two transponders simultaneously, eighteen transponders at C-band and twenty-four at Ku-band. PAS, L.P. states that the new satellite will provide at C-band the same type of capabilities as PAS-1. At Ku-band, PAS, L.P. asserts, PAS-2 will effectively match the six Ku-band transponders on PAS-1, and will allow for minimization of adjacent satellite interference. PAS, L.P. states that adjacent satellite coordination under Article XIV of the INTELSAT Agreement will not present any insurmountable problem. PAS, L.P. expects an in-service date of early 1995.[11]

III. DISCUSSION

5. In its *Separate Systems* decisions,[12] the Commission established certain criteria for considering applications for international satellite systems separate from INTELSAT. In reviewing an application for a separate international system, the Commission determines whether the applicant possesses the requisite legal, financial and technical qualifications, whether the proposal is otherwise consistent with the *Separate Systems* decisions, and whether grant of the request would be in the public interest. We will issue a conditional authorization to an applicant that satisfies these standards. Final construction, launch and operating authority, however, is contingent upon fulfillment of certain financial requirements and of U.S. obligations under Article XIV(d) of the INTELSAT Agreement.

6. *Legal Qualifications.* The Commission has already found that PAS possesses the necessary legal qualifications to be a Commission licensee.[13] As noted previously,[14] PAS has assigned its space station authorizations to PAS, L.P. In granting its consent to the assignment, the Common Carrier Bureau found that Rene Anselmo would retain effective control of PAS, L.P., and that no change in control of the separate satellite system would result. We have been presented with no evidence to the contrary. Nor has any party argued that PAS, L.P. is not legally qualified to hold a space station authorization.[15] We therefore reaffirm that PAS, L.P., as presently constituted,[16] is legally qualified under Title III of the Communications Act to provide international satellite services via PAS-2.

7. *Financial Qualifications.* We find that PAS, L.P. has satisfied the first stage of the two-stage financial showing established by the Commission in the *Separate Systems* decision. The first stage criteria include a demonstration of: (1) the estimated costs of proposed construction and launch, and any other initial expenses for the proposed space station(s); (2) the estimated operating expenses for one year after launch of the proposed space station(s); and (3) the source(s) or potential source(s) of funding for the proposed system for one year, which might include the identity of financiers and their letters of financial interest.[17]

8. PAS, L.P. estimates that the aggregate cost for the construction, launch and first-year operation of PAS-2 will total approximately $191.5 million. PAS has submitted a letter from Donaldson, Lufkin & Jenrette ("DLJ"), an international investment banking and securities firm that states it is working with PAS to raise the necessary funds for PAS-2. DLJ anticipates that, while the precise terms of any financing would be subject to market conditions, as well as PAS' realization of its own objectives, there would be a number of potential investors who would seriously consider an equity and/or debt investment in PAS-2.[18]

9. We find that PAS, L.P.'s financial showing satisfies our first stage criteria. As with the original authorization issued to PAS-2, the modified authorization that we are issuing here is conditioned on PAS, L.P.'s subsequent submission of the second stage financial information required under the *Separate Systems* decisions.[19] Except as otherwise authorized by the Commission,[20] PAS, L.P. may not expend funds for the construction of its proposed system until it demonstrates sufficient non-contingent funds to meet the construction, launch and first-year operational costs it projects for PAS-2.

10. PAS, L.P. must make its second stage financial showing no later than 60 days following the State Department's notification to the Commission that the United States has fulfilled its Article XIV(d) obligations and that the Commission may proceed with final authorization of the pro-

---

[11] *See* Letter, dated June 2, 1992, from Henry Goldberg, Attorney for PAS, to Cheryl A. Tritt, Chief, Common Carrier Bureau, FCC.

[12] Establishment of Satellite Systems Providing International Communications (*Separate Systems*), 101 FCC 2d 1046 (1985), *on recon.*, 61 RR 2d 649 (1986), *further recon.*, 1 FCC Rcd 439 (1986).

[13] *See* cases cited in notes 1 and 4.

[14] *See supra* note 1.

[15] The Commission received no petitions for reconsideration or applications for review of the Bureau's consent to the assignment of PAS' licenses to PanAmSat, L.P.

[16] We may, of course, reexamine the issue of PAS, L.P.'s legal qualification to construct, launch and operate its separate satellite system at such time as PAS, L.P. proposes a transfer of control of its license. *See* 47 C.F.R. § 25.118 (1991).

[17] *See Separate Systems*, 101 FCC 2d at 1165.

[18] Letter, dated May 14, 1992, from Gerald J. Gorman, Senior Vice President, Donaldson, Lufkin & Jenrette to Frederick A. Landman, President, Pan American Satellite. *See* File No. CSS-88-003(M).

[19] *See Separate Systems*, 101 FCC 2d at 1165-66. *See also Orion Satellite Corporation*, 5 FCC Rcd 4937 (1990); 6 FCC Rcd 4201 (1991).

[20] On March 27, 1992, PAS was granted a waiver pursuant to Section 319(d) of the Communications Act, as amended, to enable PAS to spend up to $5 million to commence construction of PAS-2. *See* Letter, dated March 27, 1992, from Richard M. Firestone, Chief, Common Carrier Bureau, FCC, to Henry Goldberg, Esq. (*Waiver Letter*). PAS was subsequently granted a waiver for an additional $8.75 million for construction of, and prelaunch expenditures for, PAS-2. *See* Letter, dated April 23, 1993, from Wendell R. Harris, Assistant Bureau Chief, International, to Henry Goldberg, Esq. The Bureau stated that all expenditures and commitments incurred by PAS under the waivers for PAS-2 are at its own risk and without prejudice to any future action the Commission may take on any issue related to PAS' application for modification or for final authority to construct, launch and operate PAS-2. *Id.*

posed system.[21] Provided PAS, L.P. meets our second stage financial requirements, the Commission will at that time issue PAS, L.P. final authority to construct, launch and operate PAS-2. However, if PAS, L.P. can satisfy our financial requirements prior to receipt of the State Department's notification, we will issue PAS, L.P. final construction authority. PAS, L.P. would in that event bear all risks and liabilities in constructing its satellite pending final Commission issuance of launch authority and a license to begin operating. If the conditions of the second stage financial showing are not timely satisfied, the conditional authorization will become null and void, and the orbital location temporarily assigned to PAS, L.P. will become available for reassignment.

11. *Technical Qualifications.* We find that PAS, L.P. satisfies the technical requirements of the *Separate Systems* decision.[22] PAS, L.P.'s engineering statement demonstrates adequate reuse of the spectrum at both C-band and Ku-band frequencies. The spacecraft is capable of operating in a manner consistent with Commission rules and the international Radio Regulations. The technical proposal for PAS-2 also is consistent with the Commission's 2 degree spacing policy,[23] as required under *Separate Systems.*

12. PAS has conceded that "[o]peration of the PAS-2 hybrid satellite at 43 degrees W.L. presents a number of technical difficulties, given the proximity of the Columbia Communications Corporation C-band capacity aboard NASA's TDRS satellite at 41^0 W.L."[24] Nevertheless, we are confident that coordination can be accomplished without Commission involvement,[25] through the cooperative efforts of PAS, L.P. and Columbia.[26] The Commission has stated on numerous occasions in the context of both international and domestic fixed-satellite service that we expect U.S.-licensed satellite operators to resolve potential interference problems between themselves because they can best weigh the technical and economic tradeoffs involved in negotiating a coordination agreement.[27] The Commission will intervene in the event the parties demonstrate that a coordination agreement cannot be reached after an exhaustive good faith effort.

13. *Orbit Assignment Policies.* As discussed earlier,[28] PAS submitted the instant application to satisfy the Commission's general rule that permits an entity initially to apply only for two orbital positions in a given band for an international separate system.[29] A grant of PAS, L.P.'s application would result in PAS, L.P. holding only two orbital locations for hybrid international satellites in the AOR -- PAS-1 at 45^0 W.L. and PAS-2 at 43^0 W.L.[30] Thus, grant of PAS, L.P.'s application is consistent with the Commission's orbit assignment policy.

14. PAS, L.P.'s application for modification also must be reviewed in light of the Commission's *Freeze Order.*[31] In 1985, the Commission instituted a "freeze" on the acceptance for filing of "applications [and] amendments to applications... for *new space stations, or for relocation of previously authorized space stations* requesting orbital positions which are east of 60 degrees West Longitude and west of 30 degrees West Longitude in the 4, 6, 11, 12 or 14 GHz bands."[32] The Commission adopted the freeze to create a static orbital deployment plan to facilitate technical coordination under the international Radio Regulations[33] and technical consultations under the INTELSAT Agreement[34] for the space stations for which applications already had been filed.[35]

15. Although PAS, L.P.'s application technically is subject to the *Freeze Order,* we believe that a waiver of the freeze would serve the public interest and will not frustrate

---

[21] *Separate Systems,* 101 FCC 2d at 1166. Upon reconsideration of the *Separate Systems* decision, 61 R.R. 2d at 666, the Commission set a one-year limit, from the date of conditional authorization, for applicant submission of the second stage financial showing. The Commission noted, however, that an applicant might extend its authorization beyond the one-year limit through a good faith showing of diligence in seeking to establish its proposed system. *Id.*

[22] *See Separate Systems,* 101 FCC 2d at 1166-73.

[23] *See generally Licensing of Space Stations in the Domestic Fixed-Satellite Service,* 54 RR 2d 577 (1983) (*Reduced Orbital Spacing).*

[24] Letter, dated March 12, 1992, from Henry Goldberg, Esq. to Richard M. Firestone, Chief, Common Carrier Bureau, FCC. *See* File No. CSS-91-002. On October 17, 1990, PAS filed an application to construct, launch and operate a third AOR satellite at 39.5^0 W.L., which the Commission dismissed on March 27, 1992, pursuant to PAS' request. *See Waiver Letter* at 2.

[25] We note, however, the obligation of the United States to coordinate the operation of PAS-2 with foreign administrations under Article 11 of the international Radio Regulations. Pursuant to Part 25 of the Commission's rules, we may impose on PAS, L.P.'s final authorizations to construct, launch and operate its international satellite systems any additional terms and conditions as required to effect coordination of the frequency assignments with other administrations. *See* 47 C.F.R. § 25.111(b).

[26] In response to a staff request, PAS submitted a study investigating interference between its satellite located at 43^0 W.L. and the TDRS satellite operated by Columbia at 41^0 W.L.

[27] *See, e.g., Pan American Satellite,* 6 FCC Rcd at 5133; *Orion Satellite Corporation,* 5 FCC Rcd at 4938-39; *Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service,* 5 FCC Rcd 179, 183 (1990) (citing *GE American Communications, Inc.,* 3 FCC Rcd 6871 (1988) at para. 2; *Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service,* 50 Fed. Reg. 35228 (1985) (*1985 Assignment Order)* at para. 19).

[28] *See supra* ¶ ¶ 3,4.

[29] The Commission will not assign any additional orbital positions to an operator for international "expansion" satellites until there is a showing that in-orbit satellites are essentially filled and that an additional orbit location is needed to satisfy firm customer growth requirements, including reasonable protection requirements. *Separate Systems,* 101 FCC 2d at 1174.

[30] PAS, L.P. also has conditional authorizations to construct, launch and operate hybrid satellites in both the POR and IOR. The Commission authorized these satellites pursuant to an exception to the general rule. Under the exception, the Commission will entertain a showing from an applicant that it should be initially authorized for more than two orbital positions where it proposes to provide international service "to more than one region of the world, and where those regions are so widely separated that more than one satellite must be used to provide the proposed service." *Separate Systems,* 101 FCC 2d at 1174.

[31] *Processing of Pending Applications for Space Stations to Provide International Communications Service,* FCC 85-296 (released June 6, 1985) (*Freeze Order).*

[32] *Id.* at ¶ 4 (emphasis added).

[33] Radio Regulations, Geneva 1979, ratified by the United States in September, 1983.

[34] INTELSAT Intergovernmental Agreement, August 20, 1971, 23 U.S.T. 3813, TIAS No. 7532.

[35] *Freeze Order* at ¶ 3.

the underlying purpose of the freeze.[36] Generally stated, the policy behind the freeze is to avoid unnecessary delay in processing existing applications, and to avoid restriction on future orbital position or frequency band assignments that may be required for pending international satellite applications filed prior to the freeze.[37] Approving PAS, L.P.'s modification would not in any way restrict our ability in the future to assign orbital positions or frequency bands to pending applications. First, PAS and Cygnus were two of the original separate system applicants, the applications of which the freeze was designed to protect. Applying the freeze to PAS, L.P. would deny consideration of PAS, L.P.'s modification in part because of the existence of the authorizations PAS, L.P. wishes to modify. Furthermore, as the freeze was designed to ensure maximum flexibility in allocating orbital locations among the original five applicants, denying PAS, L.P. the benefits of this flexibility, as applied to PAS-2, would constitute a perversion of this policy. Second, no other original applicant has requested an orbital position at or adjacent to the 43^0 W.L. location; thus, the modification would not cause burdensome coordination problems or unduly limit the orbital location possibilities for these entities. We thus find that a waiver of the *Freeze Order* as applied to PAS-2 is in the public interest.

16. *Public Interest Benefits.* We believe that PAS, L.P.'s proposed service in the AOR will provide substantial benefits to users of international satellite communication services. We are hopeful that grant of PAS, L.P.'s application will provide the user benefits contemplated by the Commission in the *Separate Systems* decision, in particular: the stimulation of technological innovation and service development; new means of packaging and transmitting information over satellites; improved network efficiencies; reduced user costs; and the creation of new business and trade opportunities through improved international communications.[38] Given these important public interest benefits, we will modify the conditional authorization granted to PAS and temporarily assign PAS-2 as a hybrid satellite (Ku-band and C-band) to the 43^0 W.L. location.

IV. CONCLUSION

17. We find that PAS, L.P. is legally, financially, and technically qualified, under Title III of the Communications Act, and the *Separate Systems* decision, to hold a conditional authorization to construct its proposed international satellite system. We also find that grant of its application is consistent with our orbit assignment policies and would serve the public interest, convenience and necessity under Section 309(a).

V. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and (j), 308, 309 and 319 of the Communications Act, as amended, 47 U.S.C. Sections 4(i) and (j), 308, 309 and 319, the application of PAS, L.P. to modify its conditional authorization to construct a hybrid international communications satellite system, File No. CSS-88-003(M), IS GRANTED, subject to the terms and conditions of this order, the technical specifications set forth in its applications, and the formal instruments of authorization to be issued at a later date.

19. IT IS FURTHER ORDERED that final authorization for both launch and operation of this satellite shall not be issued unless and until: (1) one or more foreign authorities authorize use of this system and enter into consultation procedures with the United States Party or Signatory under Article XIV(d) of the INTELSAT Agreement to ensure technical compatibility and to avoid significant economic harm; and (2) the Department of State informs the Commission that the United States has fulfilled its Article XIV(d) obligations and that the Commission may proceed with final authorization of the proposed system.

20. IT IS FURTHER ORDERED that, unless otherwise ordered by the Commission, PAS, L.P. shall not construct its hybrid separate system until it has provided the Commission with a demonstration of its current financial ability to meet the costs of construction and launch as well as operating expenses for one year following launch. PAS, L.P. shall file this information with the Commission no later than 60 days after the Department of State notifies the Commission that the United States has fulfilled its Article XIV(d) obligations with respect to the proposed system and that we may proceed with final authorization of the proposed system. Should these conditions not be timely satisfied upon the expiration of the sixty-day period following receipt of the State Department's notification, unless extended by the Commission for good cause shown, this conditional authorization shall become null and void.

21. IT IS FURTHER ORDERED that, pursuant to 47 C.F.R. Section 25.111(b), final authorization to construct, launch and operate PAS-2 may be subject to any additional terms and conditions required to effect coordination of the frequency assignments with satellites of foreign administrations pursuant to Article 11 of the international Radio Regulations.

22. IT IS FURTHER ORDERED that as a condition of this order PAS, L.P. must file with the Commission copies of any operating agreements into which it enters, within thirty days of their execution.

23. IT IS FURTHER ORDERED that PAS, L.P. may provide through the sale or lease of transponders or space segment capacity: (1) all services not interconnected with the public switched network (including private line services and video and audio transmission services); (2) emergency restoration services; (3) up to 100 64-kilobit-per-second equivalent circuits interconnected

---

[36] The U.S. Court of Appeals for the District of Columbia has stated that "a general rule, deemed valid because its overall objectives are in the public interest, may not be in the 'public interest' if extended to an applicant who proposes a new service that will not undermine the policy, served by the rule, that has been adjudged in the public interest." *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

[37] *See Freeze Order* at ¶ 2; *Columbia Communications Corporation*, 7 FCC Rcd 122, 123 (1991).

[38] *See Separate Systems* at 1177.

with the public switched networks per system for the provision of switched international telecommunications services; and (4) interconnected private line circuits.[39]

24. IT IS FURTHER ORDERED that the Commission will retain jurisdiction over the use of all space segment within the proposed system to ensure compliance with the service restrictions stated above.

25. IT IS FURTHER ORDERED that PAS, L.P. is temporarily assigned the orbital location at 43^0 W.L. for operation of its proposed AOR satellite.

26. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to PAS, L.P. does not confer any permanent right to the use of the orbit or spectrum and that the assignment is subject to change by summary order of the Commission on thirty days notice. Such a change may be ordered if the national security or the public interest requires it, or if any of the objectives or policies set forth in the Report and Order in the *Separate Systems* decision requires it. Neither this authorization nor any right granted by this authorization, will be transferred, assigned or disposed of in any manner, voluntarily or involuntarily. It must not be assigned by transfer of control of any corporation holding this authorization. It must not be transferred to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience and necessity will be served.

27. IT IS FURTHER ORDERED that PAS, L.P. shall file with the Commission no later than one year from the release date of this conditional authorization information showing that it is making all reasonable efforts toward obtaining foreign approval to provide services via its proposed system.

28. IT IS FURTHER ORDERED that PAS, L.P. must comply with the Report and Order adopted in the *Separate Systems* decision, CC Docket No. 84-1299, 101 FCC 2d 1046 (1985), as amended in the reconsideration orders, FCC 86-144 (released April 17, 1986) and FCC 86-471 (released October 31, 1986), 1 FCC Rcd 439 (1986), with FCC 92-95 (released April 8, 1992), 7 FCC Rcd 2313 (1992), and with any superseding orders.

29. IT IS FURTHER ORDERED that the conditional assignment of PAS-2 to 57^0 W.L. is hereby TERMINATED.

30. IT IS FURTHER ORDERED that this Memorandum Opinion, Order and Authorization is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

---

[39] *See Permissible Services of U.S. licensed International Communications Satellite Systems Separate from the International Telecommunications Satellite Organization (INTELSAT)*, 7 FCC Rcd 2313 (1992). Provision of private line circuits interconnected with the public switched network is contingent upon fulfillment of U.S. obligations under Article XIV(d) of the INTELSAT Agreement and grant of final authority by the Commission.

In addition, the State Department has determined that "interconnection of international satellite systems with the public switched network at a level up to twelve-hundred and fifty 64-kbit/s equivalent circuits per satellite for the provision of public switched services is consistent with U.S. telecommunications and foreign policy interests." *See* Letter, dated January 8, 1993, from Bradley P. Holmes, United States Coordinator for International Communications and Information Policy, Department of State and Gregory J. Chapados, Assistent Secretary for Communications and Information, United States Department of Commerce, to Alfred C. Sikes, Chairman, Federal Communications Commission. PAS, L.P. will be authorized to provide such interconnected circuits for the provision of switched services over PAS-2 upon implementation of these new criteria by the Commission, fulfillment of U.S. obligations under Article XIV(d) of the INTELSAT Agreement and grant of final authority by the Commission.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-147

In the Matter of

Amendment of Section 73.202(b), RM-8232
Table of Allotments,
FM Broadcast Stations.
(Volcano, Hawaii)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 18, 1993; Released: June 4, 1993

Comment Date: July 29, 1993
Reply Comment Date: August 13, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Li Hing Mui, Inc. ("petitioner"), permittee of Station KKOA(FM), Channel 299A, Volcano, Hawaii, requesting the substitution of Channel 299C1 for Channel 299A at Volcano, Hawaii, and the modification of Station KKOA(FM)'s construction permit to specify the higher class channel. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 299C1 for Channel 299A at Volcano since it will provide the community with a wide coverage area FM service. Channel 299C1 can be allotted to Volcano in compliance with the Commission's minimum distance separation requirements at petitioner's desired transmitter site with a site restriction of 2.5 kilometers (1.6 miles) west.[1] As requested, we propose to modify petitioner's construction permit for Station KKOA(FM) to specify operation on the higher class channel. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 299C1 at Volcano or require the petitioner to demonstrate the availability of an additional equivalent class channel.

3. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Volcano, Hawaii	299A	299C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **July 29, 1993,** and reply comments on or before **August 13, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Dan J. Alpert
1250 Connecticut Avenue, N.W.
Suite #700
Washington, D.C. 20036
(Attorney for Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 299C1 at Volcano are North Latitude 19-26-00 and West Longitude 155-15-42.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-148

In the Matter of

Amendment of Section 73.202(b),	RM-8236
Table of Allotments,	
FM Broadcast Stations.	
(Amite, Louisiana)	

NOTICE OF PROPOSED RULE MAKING

Adopted: May 18, 1993; Released: June 4, 1993

Comment Date: July 29, 1993
Reply Comment Date: August 13, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Amite Broadcasting ("petitioner"), requesting the allotment of Channel 243A to Amite, Louisiana, as the community's first local FM service. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 243A to Amite,[1] since it could provide the community with its first local FM service. Channel 243A can be allotted to Amite in compliance with the Commission's minimum distance separation requirements with a site restriction of 0.8 kilometers (0.5 miles) northeast in order to avoid a short-spacing to Station KRVE-FM, Channel 242C2, Brusly, Louisiana.[2]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Amite, Louisiana	--	243A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **July 29, 1993,** and reply comments on or before **August 13, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Riley M. Murphy
1100 Poydras Street
Suite 2590
New Orleans, Louisiana 70163-2590
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202)634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

---

[1] According to the 1990 U.S. Census, Amite has a population of 4,236 persons.

[2] The coordinates for Channel 243A at Amite are North Latitude 30-43-49 and West Longitude 90-30-02. Petitioner proposed coordinates North Latitude 30-43-39 and West Longitude 90-29-39 with a site restriction of 1.2 kilometers (0.8 miles) east. However, the Commission generally does not protect a prospective applicant's desired transmitter site for a new allotment if a less restrictive site is available, as there is no guarantee that the petitioner will ultimately become the licensee. Therefore, we will not consider petitioner's site, and advance a less restrictive site for the allotment of Channel 243A at Amite, Louisiana.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-128

In the Matter of

Amendment of Section 73.202(b),	RM-6955
Table of Allotments,	RM-6996
FM Broadcast Stations.	
(Dublin and Marlin, Texas)	

MEMORANDOM OPINION AND ORDER
(Proceeding Terminated)

Adopted: May 21, 1993; Released: June 4, 1993

By the Chief, Policy and Rules Division:

1. The Commission has before it the petition for reconsideration of the *Report and Order* (*"R&O"*) in this proceeding, 5 FCC Rcd 1037 (1990), filed by Robert V. Barnes ("Barnes").[1] The *R&O* allotted Channel 285C3 at Dublin as a first local transmission service, substituted Channel 225C2 in lieu of Channel 225A at Marlin, Texas, and modified the license of KRZI, Inc. ("KRZI") for Station KEYR(FM) (formerly KRXX) to specify operation on the higher class channel. KRZI filed an opposition to the petition for reconsideration.

2. *Background.* This proceeding began with the filing of a petition for rule making by KRZI proposing the substitution of Channel 225C2 in lieu of Channel 225A at Marlin, and modification of the license of Station KEYR to specify operation on the higher class channel. In response to that petition, the Commission issued a *Notice of Proposed Rule Making,* 4 FCC Rcd 4826 (1989). Barnes timely filed a counterproposal requesting the allotment of Channel 225C3 at Dublin, Texas. A Commission engineering analysis revealed that the conflicting proposals could be accommodated by allotting Channel 285C3 at Dublin. We noted that although the allotment was short-spaced with respect to the licensed site of Station KEAN(FM), Channel 286C1, Abilene, Texas, the allotment was compatible with Station KEAN's construction permit for Channel 286C. Thus, the *R&O* was issued substituting Channel 225C2 in lieu of Channel 225A at Marlin and modifying the license of KRZI, Inc. to specify operation on the higher class channel, and allotting Channel 285C3 at Dublin as a first local service. Operation at Dublin was conditioned on the grant of a license to cover the construction permit for Station KEAN at Abilene. *See R&O,* 5 FCC Rcd 1037 n.4.

3. In his petition for reconsideration Barnes requests that the Commission rescind the *R&O* in this proceeding and issue a corrected *R&O* which allots Channel 225C3 to Dublin and denies the petition for rule making by KRZI for the upgrade at Marlin. Barnes states that he cannot locate a transmitter site for Channel 285C3 at Dublin which will comply with the Commission's Rules with respect to minimum distance separation and city grade coverage. Furthermore, Barnes notes that because the allotment of Channel 285C3 at Dublin is short-spaced to the Station KEAN licensed facilities, the Dublin allotment will violate the Commission's Rules pertaining to minimum distance separation and city grade coverage in the event that Station KEAN fails to build its facilities authorized in its construction permit and remains on Channel 286C1. In response, KRZI opposes the petition for reconsideration and states that the allotment of Channel 285C3 at Dublin should stand because its own engineering analysis shows that an applicant for that channel will be able to protect Station KEAN at either its existing or proposed location.

4. *Discussion.* After a thorough review of the pleadings in this case, we will grant the petition for reconsideration. Commission records show that the construction permit for Station KEAN has been cancelled, that the station has been downgraded from Channel 286C to Channel 286C1, and Channel 286C at Abilene has been deleted from the FM Table of Allotments. Our engineering analysis further shows that there are no sites at which Channel 285C3 can be allotted at Dublin in compliance with our Rules, given the operation of Channel 286C1 at Abilene. Therefore, since the allotment of Channel 285C3 at Dublin is short-spaced to the licensed operation of Station KEAN on Channel 286C1 at Abilene, we cannot sustain the allotment of Channel 285C3 at Dublin.

5. Since there are no other channels available for allotment at either Dublin or Marlin, we must comparatively consider the communities pursuant to the FM allotment priorities[2] to determine which would warrant the allotment of a channel. As stated above, Barnes proposed first local transmission service to Dublin, and KRZI proposed an upgrade for Station KEYR at Marlin. Since provision of first local transmission service fulfills a higher allotment priority than improvement of service we find that the public interest would be served by the allotment at Dublin. As further support for this determination, we note that the community status of Dublin is not in question, and interest has been expressed in the allotment at Dublin in that two applications were filed during the filing window.[3] There-

[1] Public Notice of this petition for reconsideration was given on April 23, 1990. *See* Report No. 1815.

[2] The FM allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local transmission service; (4) other public interest matters. [Co-equal weight is given to priorities (2) and (3).] *See Revision of FM Assignment Policies and Procedures,* 90 FCC 2d 88 (1982).

[3] We note that one of the applicants at Dublin, David J. Shepherd, filed comments in this proceeding, but that the other applicant, Akiva Gerstein, did not participate. In his comments, Shepherd states that both applicants at Dublin filed requests for waiver with their applications. Shepherd states that he requested a waiver of the city grade coverage provisions of Section 73.315 of the Rules and that Gerstein requested a waiver of the minimum distance separation requirements of Section 73.207 of the Rules with respect to the Station KEAN. Finally, Shepherd states that if the Commission allots Channel 225C3, he will amend his application to specify the new channel. We note that we have not received a similar assurance from Gerstein. However, the applications were filed on May 5, 1990, which was after the petition for reconsideration in this proceeding was placed on public notice on April 23, 1990. Thus, the applicants

fore, we will substitute Channel 225C3 for Channel 285C3 at Dublin with a site restriction of 8.8 kilometers (5.4 miles) south. We also will rescind the Marlin upgrade and will substitute Channel 225A for 225C2 at Marlin at Station KEYR's licensed site.[4]

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 22, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Dublin, Texas	225C3
Marlin, Texas	225A

7. IT IS ORDERED, That the Petition for Reconsideration filed by Robert V. Barnes IS HEREBY GRANTED.

8. IT IS FURTHER ORDERED, That the Channel 225C3 is substituted for Channel 285C3 at Dublin Texas, and Channel 225A is substituted for Channel 225C2 at Marlin, Texas.

9. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Report and Order,* to the following:

David J. Shepherd	Akiva N. Gerstein
3513 Brookline Lane	3426 Hopecrest
Dallas, Texas 75234	San Antonio, Texas 78230

10. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Victoria M. McCauley, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

were on notice that our disposition of the petition for reconsideration could require that their applications be amended. The applicants will be served a copy of this *Order* and will be allowed to amend to specify the new channel without loss of cut-off protection. Barnes did not file an application for the channel.

[4] Channel 225C3 can be allotted at Dublin at coordinates 32-00-23 and 98-20-05, and Channel 225A can be allotted at Marlin at Station KEYR's licensed site at coordinates 31-19-31 and 96-54-36.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-140

In the Matter of

Amendment of Section 73.202(b), RM-8169
Table of Allotments,
FM Broadcast Stations.
(Miami, Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 6, 1993; Released: June 4, 1993

Comment Date: July 29, 1993
Reply Comment Date: August 13, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed on behalf of Marlin Broadcasting, Inc. ("petitioner"), requesting the substitution of Channel 226C for Channel 226C1 at Miami, Florida, and the modification of Station WTMI(FM)'s license to specify operation on the higher class channel.

2. We believe the public interest would be served by proposing the substitution of Channel 226C for Channel 226C1 at Miami since it could provide service to a greater number of people in the area surrounding the community. Channel 226C can be allotted to Miami in compliance with the Commission's minimum distance separation requirements at Station WTMI(FM)'s licensed site.[1] As requested, we also propose to modify Station WTMI(FM)'s license to specify Channel 226C. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 226C at Miami or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Miami, Florida	226C1, 243C, 247C, 256C1, 268C1, 298C1	226C, 243C, 247C, 256C1, 268C1, 298C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **July 29, 1993,** and reply comments on or before **August 13, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Tom W. Davidson
Akin, Gump, Strauss,
Hauer & Feld, L.L.P.
1333 New Hampshire Avenue, N.W.
Suite 400
Washington, D.C. 20036
(Attorney for Marlin
Broadcasting, Inc.)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 226C at Miami are North Latitude 25-57-59 and West Longitude 80-12-33.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-248

In the Matter of

Amendment of Section 73.202(b), RM-7778
Table of Allotments,
FM Broadcast Stations.
(Huntingdon, Tennessee)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 6, 1993; Released: June 4, 1993

By the Chief, Allocations Branch:

1. At the request of Milan Broadcasting Company, Inc. ("petitioner"), licensee of Station WVHR-FM, Channel 265A, Huntingdon, Tennessee, the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 4977, (1991), proposing the substitution of Channel 265C3 for Channel 265A at Huntingdon and modification of Station WVHR-FM's license to specify operation on the higher powered channel. Petitioner filed comments reiterating its intention to apply for Channel 265C3 if allotted to Huntingdon. West Tennessee Radio Network ("West Tennessee"), licensee of Station WMOD-FM, Bolivar, Tennessee, filed comments. Petitioner filed reply comments.

2. The *Notice* stated that Channel 265C3 could be allotted to Huntingdon in compliance with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, at petitioner's desired site. However, after the *Notice* was released, we determined that petitioner's proposal is in conflict with a counterproposal filed in MM Docket No. 91-152.[1] West Tennessee filed comments suggesting an alternate site to accommodate petitioner's upgrade at Huntingdon, noting that a decision in MM Docket No. 91-152 would not be forthcoming in the near future. West Tennessee submits that its alternate site would provide petitioner an ample area in which to locate an antenna site while providing Huntingdon with the required city grade coverage.

3. In its reply petitioner opposes West Tennessee's alternate site, noting that the counterproposal filed by Slatton in MM Docket No. 91-152 has not been placed on public notice by the Commission. Petitioner argues that the Commission should not place a site restriction on petitioner's use of Channel 265C3 at Huntingdon in order to avoid the "possibility" of a channel allotment at Selmer. In any event, petitioner states the Commission could site restrict Channel 264C3 at Selmer in order to avoid any short-spacing problems.

4. We have carefully considered the comments filed in this proceeding and believe that the allotment of Channel 265C3 to Huntingdon at the alternate site is warranted.[2] Rather than consolidate the dockets, we believe the public interest is best served by removing the conflict with the counterproposal filed by Slatton in MM Docket No. 91-152 and expediting the upgrade of service for the community of Huntingdon. Channel 265C3 can be allotted to Huntingdon at the alternate site in compliance with the Commission's minimum distance separation requirements with a site restriction of 9.8 kilometers (6.1 miles) northeast.[3] As proposed, we will also modify petitioner's authorization for Station WVHR-FM to specify operation on Channel 265C3 in accordance with the provisions of Section 1.420(g) of the Commission's Rules.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 22, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Huntingdon, Tennessee	229A, 265C3

6. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Milan Broadcasting Company, Inc. for Station WVHR-FM, Huntingdon, Tennessee, IS MODIFIED to specify operation on Channel 265C3, in lieu of Channel 265A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

---

[1] In response to a *Notice of Proposed Rule Making and Order to Show Cause* issued in MM Docket No. 91-152, 6 FCC Rcd 3474 (1991), Slatton Quick Company, Inc. ("Slatton"), filed a counterproposal requesting the substitution of Channel 264C3 for Channel 288A at Selmer, Tennessee.

[2] This change is consistent with Commission policy to attempt, where possible, to eliminate conflicts between coordinates specified by parties. We do not believe that this is unduly burdensome to petitioner since it has proposed a change of transmitter site in its rule making petition. We note, however, that petitioner may not be precluded from specifying its preferred site in its application to implement its upgrade in the event that the Selmer proposal is ultimately denied.

[3] The coordinates for Channel 265C3 at Huntingdon are North Latitude 36-03-00 and West Longitude 88-20-00.

7. Pursuant to Commission Rule Section 1.1104(1(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Milan Broadcasting Company, Inc., licensee of Station WVHR-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of the Commission's Rules to Provide Ancillary Services in the 849-851 and 894-896 MHz Bands	RM-7871 PP-21

ORDER

Adopted: May 11, 1993; Released: June 4, 1993

By the Commission:

INTRODUCTION

1. Cellular Data, Inc. (CDI) filed a Petition for Rule Making[1] (petition) requesting that the Commission authorize provision of nationwide narrowband data services on an ancillary basis in the bands allocated to the 800 MHz Air-Ground Radiotelephone Service[2] (Air-Ground) by entities unaffiliated with the Air-Ground licensees. CDI also filed a related pioneer's preference request for a license. While we support CDI's stated objective of obtaining more efficient spectrum use, we conclude that the Air-Ground Service is so recently established that authorizing new services to share its frequencies, even on a secondary basis, would be premature and could adversely affect full implementation of the Air-Ground Service. Accordingly, we deny CDI's petition and dismiss without prejudice its associated request for pioneer's preference.

BACKGROUND

2. On April 12, 1990, the Commission allocated the 849-851 and 894-896 MHz bands and promulgated rules for an Air-Ground Service.[3] Later, in June 1991, on reconsideration the Commission added certain technical rules and amended other rules.[4] The Commission has licensed six applicants to begin construction of nationwide Air-Ground systems.[5] In its 1990 *Report and Order,* the Commission stated that ancillary services in the Air-Ground bands will require extensive coordination among Air-Ground licensees as well as ancillary service providers, and concluded that additional public notice and comment at a later date would be necessary before ancillary uses of this band would be authorized.[6]

DISCUSSION

3. *Petition.* CDI petitions the Commission to initiate a rule making proceeding to consider authorizing provision of ancillary services in the Air-Ground bands.[7] CDI argues that frequency blocks unused by the Air-Ground Service could be used to establish a nationwide, common carrier data service. Specifically, CDI proposes a fixed and mobile data network that could be used for a variety of purposes, including verifying point-of-sale transactions, monitoring oil and gas wells or fuel tanks, and remote reading of vending machines. CDI's proposed narrowband system would use low-power (typically 100 milliwatts) packet radio transmissions occupying 3 kilohertz channels. CDI states that each service area would require 200 kilohertz (one Air-Ground channel block) to accommodate multiple users.

4. The three Air-Ground licensees that have implemented service all oppose CDI's petition.[8] The Air-Ground licensees argue that authorizing ancillary services would be premature because the Air-Ground Service is not yet fully developed. GTE states that ancillary use as proposed by CDI would impact ground-to-ground communications because frequency blocks that are not assigned for air-to-ground and ground-to-air communications are reserved for ground-to-ground communications.[9] Both Clairtel and GTE argue that CDI's technical analysis relies on coverage and re-use distances that were calculated based on incorrect values of minimum effective radiated power (ERP) and carrier-to-interference ratio (C/I).[10] Further, Clairtel and In-Flight assert that demand for CDI's data service could be met by other proposed or existing services, such as Personal Communications Services and services that utilize Specialized Mobile Radio Systems.[11]

5. In Reply Comments, CDI argues that initiating a rule making proceeding for ancillary services will not inhibit Air-Ground system development; that the technical arguments merely demonstrate the need for system coordination rather than the need to preserve the exclusivity of the Air-Ground service allocation; and that unassigned Air-Ground frequencies could be used efficiently for mobile data and other ancillary services without interfering with the Air-Ground Service.[12] Further, CDI asserts that its system could avoid interference with Air-Ground systems by operating at reduced powers, for example, at 10 milliwatts ERP.[13] Finally, CDI states that the arguments raised by the opposing parties are the very issues that

---

[1] RM-7871.
[2] *See* 47 C.F.R. Part 22, Subpart M (1992).
[3] Amendment of the Commission's Rules Relative to Allocation of the 849-851/894-896 MHz Bands, *Report and Order* in GEN Docket No. 88-96, 5 FCC Rcd 3861 (1990).
[4] *Memorandum Opinion and Order* in GEN Docket No. 88-96, 6 FCC 4582 (1991).
[5] Three of the six licensees have initiated service: GTE Airfone Incorporated (GTE); In-Flight Phone Corporation (In-Flight); and Claircom Communications Group, L.P. (Claircom). (On April 22, 1992, Clairtel Communications Group, L.P. (Clairtel) changed its name to Claircom Communications Group, L.P.
[6] *Report and Order* at para. 92.
[7] CDI Comments at 7; Reply Comments at 2.
[8] *See* note 5, *supra.*
[9] GTE Opposition to CDI's Petition at 6.
[10] GTE Opposition to CDI's Petition at 7-14; Clairtel Opposition at 6-9.
[11] Clairtel Opposition at 3; In-Flight Comments at 7.
[12] CDI Reply Comments.
[13] *Id.* at 9.

should be explored in detail in a rule making proceeding and that these issues do not warrant rejection of its proposal.[14]

6. As we stated in 1990 when we authorized the Air-Ground Service, permitting ancillary services secondary to the primary Air-Ground Service may be in the public interest at an appropriate time.[15] However, we believe that frequency coordination could not be accomplished at this stage of Air-Ground Service development because: (1) the Commission only recently finalized the Air-Ground service rules and licensed competitive providers; (2) the three operating licensees are still in their initial growth stage; (3) three additional licensees are authorized to construct systems and initiate service; and (4) GTE is engaged in replacing its experimental system. We also note that the Commission has required all licensees to build at least 25 ground stations within three years of license grant and to complete at least 50 ground stations within five years of license grant.[16] The first licenses were granted in December 1990, and therefore construction of the first systems is not required to be completed until December 1995. We anticipate that over the next several years there will be substantial growth and development of Air-Ground systems and that the technical specifications of the systems will stabilize.

7. For the above reasons we believe that the Air-Ground Service has not had an opportunity to mature sufficiently to permit reliable analysis of whether there will be sufficient spectrum in these bands to support ancillary services in addition to Air-Ground services. Further, we are concerned that authorizing provision of ancillary services at this time on a secondary basis by entities unaffiliated with the Air-Ground licensees would adversely impact the growth and development of the primary Air-Ground Service. Accordingly, we decline to grant CDI's petition for rule making, and are dismissing without prejudice its request for pioneer's preference as moot.[17]

ORDERING CLAUSES

8. For the foregoing reasons, IT IS ORDERED that the Petition for Rule Making filed by Cellular Data, Inc. HEREBY IS DENIED. This order is pursuant to the authority set forth in Sections 1.401(e) and 1.407 of the Commission's Rules, 47 C.F.R. §§ 1.401(e) and 1.407.

9. IT IS FURTHER ORDERED that Cellular Data, Inc.'s request for pioneer's preference HEREBY IS DISMISSED without prejudice as moot. This order is pursuant to the authority set forth in Section 1.402 of the Commission's Rules, 47 C.F.R. § 1.402.

10. For further information concerning this Order, contact Carl Huie at (202) 653-8112, Office of Engineering and Technology, Federal Communications Commission, Washington, DC 20554.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

---

[14] *Id.* at 4.
[15] *Report and Order* at paragraphs 91 and 92.
[16] 47 C.F.R. § 22.1102(c)(2) (1992).
[17] *See* 47 C.F.R. §§ 1.402, 1.403, 5.207 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Lights of America — NAL/Acct No. 315HF0017
Walnut, California

Liability for
Monetary Forfeiture

NOTICE OF APPARENT LIABILITY

Adopted: May 18, 1993; **Released: June 4, 1993**

By the Field Operations Bureau:

I. INTRODUCTION

1. This is a Notice of Apparent Liability for Monetary Forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended (the Act), 47 C.F.R. §503(b), and 1.80 of the Commission's Rules, 47 C.F.R. §1.80, to Lights of America for marketing radio frequency devices (Part 18 devices) in violation of Sections 2.931, 2.1043 and 18.307 of the Commission's Rules, 47 C.F.R. §§2.931, 2.1043, 18.307.

2. The appropriate amount of forfeiture for this violation is $5,000.

II. BACKGROUND

3. On June 9, 1992, Commission engineering personnel from the Sampling and Measurements Branch, Authorization and Evaluation Division, Office of Engineering and Technology (the FCC Laboratory), purchased two samples of radio frequency devices, RF Lights, being marketed by Lights of America with model numbers "2027" and "2030TP". Tests conducted on the samples by the Sampling and Measurements Branch found both to be non-compliant, varying from the authorized specifications and exceeding the AC line conducted emissions limits. Section 18.307(c) provides conduction limits for RF lighting devices, and Section 2.931 requires grantees to warrant that each unit of equipment marketed under a grant will conform to the unit that was measured for the grant.

III. DISCUSSION

4. Measurements and inspection of the sample devices tested indicated that the devices being marketed varied from schematic representations and photographs submitted with the original application in that a capacitor across the AC power input lines was missing. The variations resulted in excess emissions levels ranging from +17.0 dB to +19.5 dB on the Model 2030TP, and excess levels ranging from +15.0dB to +22.0 dB on the Model 2027.

IV. CONCLUSION

5. Pursuant to the Commission's policy for assessing forfeitures, *see Policy Statement, Standards for Assessing Forfeitures,* 6 FCC Rcd 4695 (1991), *modified in part on Reconsideration,* 7 FCC Rcd 5339 (1992), *petition for review pending sub. nom. USTA v. FCC,* No. 92-1321 (D.C. Cir. filed July 30, 1992) (*Policy Statement),* and Section 503(b)(2) of the Act, the base forfeiture amount for marketing devices in violation of Commission certification requirements under Sections 2.931, 2.1043 and 18.307(c) is $7,000. In view of the fact that Commission records do not disclose any prior history of violations, we have reduced this amount to $5,000.

6. The appropriate amount for this forfeiture is therefore $5,000. No further adjustments appear warranted.

V. ORDERING CLAUSES

7. Accordingly, pursuant to Section 503(b) of the Communications Act, and Section 1.80 of the Commission's Rules, IT IS ORDERED, that Lights of America IS APPARENTLY LIABLE FOR A MONETARY FORFEITURE in the amount of five thousand dollars ($5,000) for willful violation of Section 302 of the Communications Act, and Sections 2.931, 2.1043 and 18.307(c) of the Commission's Rules.

8. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, that Lights of America shall, within 30 days of release of this Notice pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Any statements regarding inability to pay must be supported by appropriate documentation.[1] Send written responses regarding why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
ATTN: NAL No.315HF0017
RM 744, Mail Stop AC/1500E3
1919 M Street, N.W.
Washington, D.C. 20554

Forfeitures shall be paid by check or money order made payable to the Federal Communications Commission. The remittance should be marked "Acct. No. 315HF0017" and mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

9. IT IS FURTHER ORDERED that this notice shall be sent, by certified mail, to Light of America, 611 Reyes Drive, Walnut, CA 91789.

[1] Claims of inability to pay should be supported by tax returns or other financial statements for the most recent three years.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Tariff F.C.C. No. 12

Transmittal No. 5135

ORDER

Adopted: May 27, 1993; **Released: May 27, 1993**

By the Chief, Tariff Division, Common Carrier Bureau:

1. On May 11, 1993, AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective May 30, 1993, on 19 days' notice pursuant to special permission granted by the Common Carrier Bureau.[1] This filing modifies Virtual Telecommunications Network Service Option 79 by clarifying material within the Rate Schedule D Revenue Stimulation Credit section.

2. On May 14, 1993, MCI Telecommunications Corporation (MCI) filed a petition to reject or suspend and investigate Transmittal No. 5135. AT&T replied on May 19, 1993.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 5135 and all associated pleadings. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to require rejection, and that no question has been presented that warrants investigation at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Tariff F.C.C. No. 12, Transmittal No. 5135, filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] Application No. 1600 for Special Permission for Waiver of Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, filed May 7, 1993; Special Permission No. 93-382, granted May 10, 1993. This special permission allowed Transmittal 5135 to become effective on 5 day's notice, on May 16, 1993. The Bureau extended the effective date of the transmittal for 14 additional days to allow sufficient time to consider the petition filed by MCI.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of WNYC Communications Group against Time Warner New York City Cable Group — CSR-3748

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: May 20, 1993; Released: May 21, 1993

By the Chief, Mass Media Bureau:

INTRODUCTION

1. On October 5, 1992, the Cable Television Consumer Protection and Competition Act of 1992 ["the Cable Act"] became law.[1] On December 4, 1992, the Cable Act's requirements for mandatory carriage of certain noncommercial educational stations became effective.[2] On January 19, 1993, WNYC Communications Group ["WNYC-TV"], licensee of Station WNYC-TV (Educ., Channel 31), New York, New York, filed a complaint seeking to ensure the station's continued carriage on channel 3 on the cable systems serving the Borough of Manhattan in New York City that are operated by Time Warner New York City Cable Group ["Time Warner"]. Time Warner opposed this complaint on February 18, 1993, and WNYC-TV replied on March 5, 1993.[3]

SUMMARY OF PLEADINGS

2. WNYC-TV complains that, despite its status as a qualified local noncommercial educational television station entitled to on channel carriage rights on channel 3 on Time Warner's Manhattan cable systems, Time Warner has repositioned WNYC to channel 31. This, states WNYC-TV, is contrary to the station's wishes and, therefore, is a violation of WNYC-TV's rights under the Cable Act and the Commission's implementing rules. WNYC-TV notes that Congress has recognized that channel shifting is disruptive to viewers and harmful to local stations, citing H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 54-55, 71 (1992) and S. Rep. No. 102-92, 102d Cong. 1st Sess. 44 (1991), and urges swift Commission action.

3. In opposition, Time Warner argues that its repositioning of WNYC-TV from channel 3 to channel 31, the channel on which WNYC-TV is licensed to operate, will in fact be beneficial to the station and to its viewers. WNYC-TV is carried on channel 31 on Time Warner's cable systems serving other New York City boroughs, notes Time Warner, and the station promotes itself as "WNYCTV 31." WNYC-TV's carriage on cable channel 3 in Manhattan is a historic accident, contends Time Warner, for at the time the Manhattan systems were originally constructed in the 1960s, they did not have 31 channels.[4]

4. In its supplemental opposition filed April 13, 1993, Time Warner contends that WNYC-TV is not in fact entitled to Mandatory carriage and channel positioning rights. Time Warner argues that WNYC-TV, as a station owned and operated by the City of New York, must transmit "predominantly noncommercial programs for educational purposes" in order to possess such rights, citing 47 U.S.C. §535(l)(1)(B). This has been defined by the Commission, Time Warner notes, as transmitting such programs, as defined in §73.621 of the Commission's Rules, for at least 50 percent of the station's broadcast week. 47 C.F.R. §76.55(a)(2). *See also Report and Order* at _____. Citing *Way of the Cross of Utah, Inc.*, 101 FCC 2d 1368 (1985), Time Warner further argues that §73.621 of the Rules distinguishes between instructional and general educational programming on the one hand, and cultural and entertainment programming on the other. A qualified noncommercial educational station may transmit the latter programming, Time Warner notes, but must transmit predominantly the former programming. This, Time Warner claims, WNYC-TV fails to do, and Time Warner submits a copy of WNYC-TV's program schedule for the week of April 5-11, 1993, in support of this argument. Time Warner maintains that the Commission possesses broad dispute resolution authority which it should use to hold that uniform carriage of WNYC-TV on cable channel 31 throughout New York City best serves the public interest.

5. In reply, WNYC-TV argues that instructional, educational, cultural, and entertainment categories as used in §73.621(c) of the Rules are overlapping categories, not exclusive categories, and are not in any event designed to limit the carriage rights of licensed stations. In fact, notes WNYC-TV, Congress specifically cited the station as an example of a qualified noncommercial educational television station for purposes of carriage and channel position rights in the Cable Act's legislative history, citing H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 104 (1992). WNYC-TV further notes that repositioning it will not achieve uniform positioning city-wide, as systems not owned by Time Warner carry WNYC-TV on channel 49. Such repositioning, claims WNYC-TV, will only confuse its viewers and allow Time Warner to place Turner Network TV, a service in which Time Warner's corporate parent and its affiliates have an ownership interest, on channel 3 on Time Warner's systems.

---

[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] 47 U.S.C. §535.

[3] On March 11, 1993, the Commission adopted a *Report and Order in MM Docket No. 92-259*, 8 FCC Rcd 2965 (1993) ["*Report and Order*"]. In view of the fact that the rules adopted therein could have an impact upon a cable system's obligation to carry certain noncommercial educational stations, and could also affect the resolution of a disputed carriage request already on file with the Commission, parties opposing such requests on file were permitted 15 days to file a supplemental pleading after the release date of the *Report and Order, supra*. Public Notice, "Carriage of Noncommercial Educational Stations by Cable Television Systems," Mimeo No. 32419 (released March 26, 1993). Replies to such supplemental oppositions could be filed within 5 days. *Id.* Time Warner supplemented its opposition on April 13, 1993. WNYC-TV replied on April 23, 1993.

[4] In reply, WNYC-TV states that Time Warner has repositioned WNYC-TV, and urges immediate Commission action.

DISCUSSION

6. We uphold WNYC-TV's complaint against Time Warner. Section 615(g)(5) of the Cable Act, as implemented by §76.57(b) of the Commission's Rules, requires that the signals of noncommercial educational broadcast stations carried on a cable television system pursuant to the must-carry requirements must appear on the cable system channel number on which the qualified local noncommercial educational station is broadcast over the air or on the channel in which it was carried on July 19, 1985, at the election of the noncommercial educational station. WNYC-TV was carried on the Time Warner systems serving the Borough of Manhattan on cable channel 3 on July 19, 1985 and the station has elected to continue to be carried on that channel. Notwithstanding Time Warner's assertions of the beneficial impact of repositioning WNYC-TV on those cable systems, the decision as to cable channel position rests with WNYC-TV.

7. Time Warner's arguments challenging WNYC-TV's rights to carriage are not persuasive. WNYC-TV is clearly a qualified noncommercial educational television station within the meaning of the Cable Act and our rules. As required by 47 U.S.C. §535 to be eligible for mandatory carriage, WNYC-TV's city of license is within 50 miles of Time Warner's principal headend.[5] WNYC-TV is "owned and operated by a municipality" -- WNYC Communications Group is an agency in the Department of General Services of the City of New York -- and WNYC-TV "transmits predominantly noncommercial programs for educational purposes." This is defined by our rules to be "as defined in §73.621 of this chapter, for at least 50 percent of its broadcast week." 47 C.F.R. §76.55(a)(2). While Time Warner would limit the definition of "educational" to instructional and related educational programming, the Commission clearly stated in the *Report and Order, supra,* that "the *Notice* did not intend to limit the scope of 'educational purposes' only to the requirements of paragraph (a) of §73.621, but intended that all of §73.621 would be governed by that definition." *Report and Order* at n.7. For purposes of this portion of the Cable Act and the Commission's implementing rules, a broad, inclusive definition of "noncommercial programs for educational purposes" is appropriate and has been adopted.[6] Not only has WNYC-TV demonstrated that it qualifies as a local noncommercial educational television station, but also Congress has specifically identified WNYC-TV as an example of a qualified noncommercial educational television station for purposes of 47 U.S.C. §535. *See* H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 104 (1992).

8. In view of the foregoing, we find that grant of WNYC-TV's petition is in the public interest.

9. Accordingly, IT IS ORDERED, That the petition for special relief (CSR-3748) filed January 19, 1993, by WNYC Communications Group IS GRANTED in accordance with §615(j)(3) (47 U.S.C. §535) of the Communications Act of 1934, as amended.

10. IT IS FURTHER ORDERED, That Time Warner New York City Cable Group SHALL CARRY the signal of WNYC-TV on cable channel 3 of Time Warner's cable systems serving the Borough of Manhattan within forty-five (45) days of the release date of this *Order.* This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

---

[5] WNYC-TV's Grade B service contour also encompasses Time Warner's principal headend, an alternative qualifying criterion. 47 U.S.C. §535(l)(2)(B).

[6] As the Commission has previously stated, "As in all matters relating to programming, we will defer to the judgement of the broadcaster unless his categorization appears to be arbitrary or unreasonable." *Way of the Cross of Utah, Inc.,* 101 FCC 2d at 1372 n.5, *citing Notice of Inquiry in Docket No. 78-164,* 43 Fed. Reg. 30847, 30844-45 (1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 2, 1993

COMMISSION GRANTS INTERIM, BLANKET RULE WAIVER TO PERMIT CERTAIN NONDOMINANT COMMON CARRIERS TO FILE TARIFFS ON LESS THAN 14 DAYS NOTICE

On November 13, 1992, the United States Court of Appeals for the District of Columbia Circuit vacated the permissive detariffing (forbearance) rules as applied in the Commission's *Fourth Report and Order* in the *Competitive Carrier* proceeding. *See AT&T Co. v. FCC*, No. 92-1053 (D.C. Cir. Nov. 13, 1992); 95 FCC Rcd 554 (1983). The Commission's petition to the court for rehearing *en banc* was denied on January 21, 1993. Under court rules, the mandate will issue shortly, unless a party petitions the court for a stay of the mandate. The forbearance rules invalidated by the Court in *AT&T Co. v. FCC* excused certain nondominant carriers from the tariff filing requirements of Section 203 of the Communications Act.

In light of the court's decision, previously forborne carriers must file tariffs pursuant to Section 203. On January 27, 1993, the Commission issued a public notice in which it stated that it does not intend to reject tariff filings from carriers affected by the court's order for failure to comply with the technical requirements sections of our rules regarding the form of tariffs.

A number of different carriers have expressed a desire to make their tariffs effective on short notice than the existing rules require. Due to the potentially large number of carriers affected by the court's decision, and the large number of nondominant carriers that have not previously filed interstate tariffs, the Commission, on its own motion, is waiving the 14-day notice requirements set forth in Section 61.58(b) of the Commission's Rules for the filing of tariffs by affected carriers for services which do not now have tariffs on file. Requests for special permission for such carriers to file tariffs on less than 14 days' notice, as required by Sections 61.151-153 of the Commission's Rules, will not be required. This is an interim measure taken to facilitate the filing of tariffs by those carriers affected by the Court's order. Accordingly, effective upon release of this notice and for a period of 60 days from the release of this notice, nondominant carriers that were subject to forbearance may file their tariffs with the Commission on less than 14 days' notice without requesting special permission.

For further information, contact Mary Brown, Tariff Division, Common Carrier Bureau, at (202) 632-6387.

Action by the Commission February 1, 1993.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BUSINESS WATS, INC.
Complainant,

v. File No. E-93-011

AMERICAN TELEPHONE &
TELEGRAPH COMPANY,
Defendant.

PROTECTIVE ORDER

Adopted: May 27, 1993; Released: June 7, 1993

By the Acting Chief, Enforcement Division, Common Carrier Bureau:

To expedite the flow of discovery material, facilitate the prompt resolution of disputes over confidentiality, protect adequately material entitled to be kept confidential, and insure that protection is afforded only to material so entitled, and with the consent of the parties, IT IS ORDERED:

1. *Non-disclosure of Stamped Confidential Documents.* Except with the prior written consent of the party or other person originally designating a document to be stamped as a confidential document, or as hereinafter provided under this order, no stamped confidential document may be disclosed to any person.

A "stamped confidential document" means any document which bears the legend (or which shall otherwise have had the legend recorded upon it in a way that brings its attention to a reasonable examiner) "CONFIDENTIAL--SUBJECT TO PROTECTIVE ORDER IN Complaint No. E-93-011, before the Federal Communications Commission" to signify that it contains information believed to be subject to protection under the Commission's rules. For purposes of this order, the term "document" means all written, recorded, or graphic material, whether produced or created by a party or another person, whether produced pursuant to the Commission's rules, subpoena, by agreement, or otherwise. Interrogatory answers, responses to requests for admission, deposition transcripts and exhibits, pleadings, motions, affidavits, and briefs that quote, summarize, or contain materials entitled to protection may be accorded status as a stamped confidential document, but, to the extent feasible, shall be prepared in such a manner that the confidential information is bound separately from that not entitled to protection.

2. *Permissible Disclosure.* Notwithstanding paragraph 1, stamped confidential documents may be disclosed to counsel for the parties in this action, including in-house counsel for American Telephone and Telegraph Company ("AT&T") who are actively engaged in the conduct of this litigation; to the partners, associates, secretaries, paralegal assistants, and employees of such an attorney to the extent reasonably necessary to render professional services in the litigation; to persons with prior knowledge of the documents or the confidential information contained therein, and their agents; and to Commission officials involved in this litigation (including court reporters, persons operating audio or video recording equipment at depositions, and any special master appointed by the Commission.[1] Subject to the provisions of subparagraph (c) below, such documents may also be disclosed:

(a) to any person designated by the Commission in the interest of justice, upon such terms as the Commission may deem proper; and

(b) in the event the Commission orders that depositions may be taken, to persons noticed for depositions or designated as trial witnesses to the extent reasonably necessary in preparing to testify to outside consultants or experts retained for the purpose of assisting counsel in the litigation; to employees of parties involved solely in one or more aspects of organizing, filing, coding, converting, storing, or retrieving data or designing programs for handling data connected with these actions, including the performance of such duties in relation to a computerized litigation support system; and to employees of third-party contractors performing one or more of these functions; provided, however, that in all such cases the individual to whom disclosure is to be made has signed a form containing: (1) a recital that the signatory has read and understands this order; and (2) a recital that the signatory understands that unauthorized disclosures of the stamped confidential documents is prohibited.

(c) Before disclosing a stamped confidential document to any person listed in subparagraph (a) or (b) who is a competitor (or an employee of a competitor) of the party that so designated the document, the party wishing to make such disclosure shall give at least ten days' advance notice in writing to the counsel who designated such information as confidential, stating the names and addresses of the person(s) to who the disclosure will be made, identifying with particularity the documents to be disclosed, and stating the purposes of such disclosure. If, within the ten-day period, a motion is filed objecting to the proposed disclosure, disclosure is not permissible until the Commission has denied such motion.

[1] Disclosure may not be made to counsel involved in any related litigation between the parties pending before the Commission or in courts, except upon specific Commission approval.

3. *Declassification.* A party (or aggrieved entity permitted by the Commission to intervene for such purpose) may apply to the Commission for a ruling that a document (or category of documents) stamped as confidential is not entitled to such status and protection. The party or other person that designated the document as confidential shall be given notice of the application and an opportunity to respond. To maintain confidential status, the proponent of confidentiality must show by a preponderance of the evidence that there is good cause for the document to have such protection.

4. *Confidential Information in Depositions.* In the event the Commission orders that depositions may be taken in this proceeding:

(a) A deponent may during the deposition be shown, and examined about, stamped confidential documents if the deponent already knows the confidential information contained therein or if the provisions of paragraph 2(c) above are complied with. Deponents shall not retain or copy portions of the transcripts of their depositions that contain confidential information not provided by them or the entities they represent unless they sign the form prescribed in paragraph 2(b) above. A deponent who is not a party or a representative of a party shall be furnished a copy of this order before being examined about, or asked to produce, potentially confidential documents.

(b) Parties (and deponents) may, within fifteen (15) days after receiving a deposition, designate pages of the transcript (and exhibits thereto) as confidential. Confidential information within the deposition transcript may be designated by underlining the portions of the pages that are confidential and marking such pages with the following legend: "Confidential--subject to protection pursuant to Commission Order." Until expiration of the 15-day period, the entire deposition will be treated as subject to protection against disclosure under this order. If no party or deponent timely designates confidential information in a deposition, then none of the transcript or its exhibits will be treated as confidential; if a timely designation is made, the confidential portions and exhibits shall be filed under seal separate from the portions and exhibits not so marked.

5. *Confidential Information Filed in the Record.* Subject to the Federal Rules of Evidence, stamped confidential documents and other confidential information may be offered in evidence at any Commission hearing, or in the record made by the parties and submitted to the Commission in this proceeding, provided that the proponent of the evidence gives five days' advance notice to counsel for the party or other person that designated the information as confidential. Any party may move the Commission for an order that the evidence be received in camera or under other conditions to prevent unnecessary disclosure. The Commission will then determine whether the proffered evidence should continue to be treated as confidential information and, if so, what protection, if any, may be afforded to such information in the proceeding.

6. *Subpoena by Courts or Other Agencies.* If a court or another administrative agency subpoenas or orders production of stamped confidential documents which a party has obtained under the terms of this order, such party shall promptly notify the party or other person who designated the document as confidential of the pendency of such subpoena or order.

7. *Filing.* Stamped confidential documents need not be filed with the Commission's Secretary except when required in connection with motions under Sections 1.727 or 1.730 of the Commission's rules and regulations or other matters pending before the Commission. If filed, they shall be filed under seal and shall remain sealed while in the Secretary's office or such other place as the Commission may designate so long as they retain their status as stamped confidential documents.

8. *Client Consultation.* Nothing in this order shall prevent or otherwise restrict counsel from rendering advice to their clients and, in the course thereof, relying generally on examination of stamped confidential documents; provided, however, that in rendering such advice and otherwise communicating with such client, counsel shall not make specific disclosure of any item so designated except pursuant to the procedures of paragraph 2(b) and (c) above.

9. *Prohibited Copying.* If a document contains information so sensitive that it should not be copied by anyone, it shall bear the additional legend "Copying Prohibited." Application for relief from this restriction against copying may be made to the Commission, with notice to counsel so designating the document.

10. *Use.* Persons obtaining access to stamped confidential documents under this order shall use the information only for preparation and the conduct of this litigation (including appeals), and shall not use such information for any other purpose, including business, governmental, commercial, or other administrative or judicial proceedings.

11. *Non-Termination.* The provisions of this order shall not terminate at the conclusion of these actions. Within 120 days after final conclusion of all aspects of this litigation, stamped confidential documents and all copies of same (other than exhibits of record, if any) shall be returned to the party or person which produced such documents, or, at the option of the producer (if it retains at least one copy of the same), destroyed. All counsel of record shall make certification of compliance herewith and shall deliver the same to counsel for the party who produced the documents not more than 150 days after final termination of this litigation.

12. *Modification Permitted.* Nothing in this order shall prevent any party or other person from seeking modification of this order or from objecting to discovery that it believes to be otherwise improper.

13. *Responsibility of Attorneys.* The attorneys of record are responsible for employing reasonable measures to control, consistent with this order, duplication of, access to, and distribution of copies of stamped confidential documents. Parties shall not duplicate any stamped confidential document except working copies and for filing at the Commission under seal.

14. This Order is issued pursuant to Sections 4(i) and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 208, and authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective upon its adoption.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Acting Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re Applications of

Univision	File Nos. BTCCT-920508KG - KL
Holdings, Inc.	BTCCT-920508KN - KO
(Transferor)	BTCTTL-920508KM
	BTCTTL-920508KP
and	BTCTTL-920508KS
	BTCTT-920508KQ - KR

Perenchio
Television, Inc.
(Transferee)

For Transfer of Control
of Univision Station
Group, Inc., Licensee of
Television Stations KFTV, Hanford,
KDTV, San Francisco, and KMEX-TV,
Los Angeles, California, WLTV, Miami
Florida, WXTV, Paterson, New Jersey,
KLUZ-TV, Albuquerque, New Mexico,
KUVN(TV), Garland and KWEX-TV, San.
Antonio, Texas, and of Low Power,
Television Stations K48AM, Albuquerque,
New Mexico, K39AB, Bakersfield,
California, and K30CE, Austin, Texas,
and of Television Translator Stations
W35AB, Philadelphia, Pennsylvania,
and W47AD, Hartford, Connecticut.

HC Crown Corp.	File Nos. BTCCT-920508KE
(Transferor)	BTCTTL-920508KF

and

Perenchio
Television, Inc.
(Transferee)

For Transfer of Control of KTVW,
Inc., Licensee of Television Station
KTVW-TV, Phoenix, Arizona, and of
Low Power Television Station K40AC,
Tucson, Arizona.[1]

MEMORANDUM OPINION AND ORDER

Adopted: May 26, 1993; Released: June 7, 1993

By the Commission:

1. In *Univision Holdings, Inc.*, 7 F.C.C. Rcd. 6672 (1992),[2] we approved the transfer of control of the stations set out in the caption from subsidiaries of Hallmark Cards, Inc. (Hallmark), to Perenchio Television, Inc. (the Buyer). In taking that action, we denied or dismissed objections and petitions filed by several entities, including the American GI Forum of Texas (the Forum). We consider here the petition for reconsideration of that action filed by the Forum on October 30, 1992, and oppositions filed by the Buyer and Hallmark on November 13, 1992.[3] We shall dismiss the petition for reconsideration for the reasons stated below.

2. We previously concluded that the Forum had failed to establish that it was a party in interest to the proceeding, within the meaning of section 309(d) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 309(d) (1988). Accordingly, we dismissed the Forum's pleading as a formal petition to deny, but considered it as an informal objection under section 73.3587 of our Rules. 47 C.F.R. § 73.3587 (1991). When considered as an informal objection, we concluded that the Forum had failed to raise a substantial and material question of fact warranting review in a hearing.

3. A party wishing to proceed formally when seeking reconsideration must, under section 405 of the Act, establish that it is "aggrieved" or "adversely affected" by the Commission's action. Further, we apply the factual pleading standards set out in section 309(d) of the Act when considering the standing of petitioners seeking reconsideration and the substance of their contentions. *WWOR-TV, Inc.*, 6 F.C.C. Rcd. 6569, 6570 n.7 (1991), *appeal pending sub nom. Garden State Broadcasting Limited Partnership v. FCC*, No. 91-1043 (D.C. Cir. filed January 24, 1991). Accordingly, nonspecific, conclusory allegations are insufficient, as are allegations of fact regarding matters we cannot officially notice that are not supported by an affidavit from a person with first-hand knowledge of the facts alleged. Petitions for reconsideration are also governed by section 1.106 of the Rules, which provides in subsection 1.106(b)(1) that a party seeking reconsideration should state with particularity the manner in which its interests were adversely affected by the action taken and, under subsection 1.106(d)(2), the reasons why it believes that any findings of fact or conclusions of law were in error. Subsections 1.106(b)(2)(i) and (ii) further require that any new facts or arguments must be accompanied by a showing that they are based on events or changed circumstances arising after the last opportunity to present such matters, or be based on facts that could not have been learned at an earlier stage by the exercise of ordinary diligence.

4. The Forum's petition is very brief, and proceeds principally on behalf of one of its members, Mr. Johnny Canales, whose affidavit of October 29, 1992, is attached to

[1] Station K40AC is currently operating pursuant to a special temporary authorization as K52AO.
[2] *Appeal pending sub nom. National Hispanic Media Coalition v. FCC*, No. 92-1549 (D.C. Cir. filed October 20, 1992).
[3] The Forum did not file a reply pleading.

the petition. The petition and affidavit to a large degree intertwine procedural and substantive matters in that the asserted basis for being aggrieved or adversely affected and the substance of the pleading are essentially the same. Mr. Canales asserts that he is personally aggrieved by the grant of the applications to transfer control of the stations set out in the caption. He alleges that the Buyer's minority shareholder, Televisa, has been "enforcing an international conspiracy to interfere with [his] freedom of movement in the U.S. and Mexico television industry," and that the "conspirators have now enforced *de facto* control of Univision network programming and control of station programming." This alleged conspiracy is evidenced, according to the affidavit, by cancellation of Mr. Canales' television program on the Univision network in specified markets, and the cancellation of promotional announcements for that program.

5. Mr. Canales does not state the date when these actions occurred, however. Thus, we are unable to determine based on his affidavit whether these matters were known before or after the first decision, a necessary factor under section 1.106 of the Rules. The Forum's pleading is also silent as to when these facts could have been elicited. Accordingly, the Forum has not established that it could not have learned the facts earlier by the exercise of ordinary diligence. Finally, the Forum does not identify the findings of fact or conclusions of law it believes to be erroneous. We conclude, therefore, that the Forum has failed to meet the requirements of section 1.106 of our Rules, based solely on a review of its petition.[4]

6. We also believe that the Forum has not established how it or Mr. Canales is aggrieved or adversely affected by a grant of the application, as required by section 405 of the Act. Even if the Forum's allegations were timely, we note that cancellation of programs is the prerogative of all licensees in the exercise of their programming discretion. The assertion that a program was cancelled by a licensee or a network does not establish that a performer in, or producer or distributor of, that program is adversely affected by the grant of the applications. Nor is a network obligated to air any promotional announcements for any network program, or to include such announcements in network distributions to all affiliates, particularly when some of them no longer carry the program. The Forum has alleged no specific facts to establish that the cancellations of the programs and promotional announcements were anything other than the exercise of normal licensee discretion. Moreover, the applicants had not closed the sale, and the Univision network and the stations were under the control of Hallmark, as of the date of Mr. Canales' most recent affidavit.[5] The Forum alleges no specific facts that would tie the actions described in the affidavit to the Buyer or to Televisa, a 12.5-percent shareholder in the Buyer. It follows that the Forum has failed to establish nexus between the actions complained of and the Buyer and its principals. We conclude that the Forum has failed to establish with particularity that it is "aggrieved" or "adversely affected" by a grant of the applications, within the meaning of section 405 of the Act. Accordingly, we shall dismiss its petition for reconsideration.

7. Even an informal review of the remainder of the Forum's petition provides no other basis for action on our part. The Forum states that it is concerned about the "license transfer of the largest hispanic television network." As explained in our first decision, however, we do not license television networks, and the transfer of the network is therefore not subject to our approval. 7 F.C.C. Rcd. at 6673 and 6680. The Forum is not concerned about the qualifications of the Buyer, Mr. Perenchio or Venevision International, and instead directs its concerns solely at Televisa, a minority, noncontrolling shareholder of the Buyer. The Forum's allegations about an illegal conspiracy on Televisa's part are conclusory and not specific. Moreover, it is our practice not to investigate such matters initially and to await the final decision of a competent forum. *Character Qualifications*, 102 F.C.C.2d 1179, *reconsidered in part*, 1 F.C.C. Rcd. 421 (1986). No such adjudications are alleged here. Accordingly, the Forum has not established a basis for questioning Televisa's qualifications, either at the first stage of this proceeding or now. Further, to the extent that the Forum is concerned about potential anticompetitive practices that might result from the sale, we observe that the Justice Department did not bar the transaction, after review under the Hart-Scott-Rodino Antitrust Improvements Act.[6] It is not our practice, as previously explained, to conduct initial investigations of alleged anticompetitive conduct. *Univision Holdings, Inc.*, 7 F.C.C. Rcd. at 6680; *Character Qualifications*, 102 F.C.C.2d at 1202. The Forum does not allege any final adjudications of anticompetitive practices, and we are not independently aware of such adjudications. In sum, the Forum has presented no basis for pursuing these matters further.

8. Accordingly, IT IS ORDERED, That the petition for reconsideration filed by the American GI Forum of Texas IS DISMISSED.

9. The staff of the Mass Media Bureau is directed to send copies of this decision to the parties to the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[4] In its opposition, Hallmark submits additional information on this point. It states that the Johnny Canales program is still distributed by the Univision Network, but that it has been cancelled in some markets by affiliates. Some of the affiliates still carrying the program are Hallmark owned and others are not. Further, Hallmark states that because of the cancellations in some markets, the Univision Network has not promoted the program since August, 1991, which, Hallmark notes, is well before the origin of the current sales transaction.

[5] The Forum has at no point challenged Hallmark's qualifications to remain a licensee, and presumably prefers that Hallmark operate the stations, rather than the Buyer.

[6] Pub. L. 94-435, 90 Stat. 1383 (1976)(codified in scattered sections of 15 U.S.C.).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

License Renewal Applications	File Nos.
of Asterisk Communications, Inc.,	BR-880920YO
Licensee of Stations	BRH-880920YN
WTRS/WTRS-FM	
Dunnellon, Florida	

MEMORANDUM OPINION & ORDER AND NOTICE OF FORFEITURE

Adopted: May 26, 1993; Released: June 7, 1993

By the Commission:

I. INTRODUCTION

1. The Commission has before it (i) a petition timely filed by the Florida State Conference of Branches of the NAACP and its respective branches (NAACP) for reconsideration of the Commission's decision in *Applications of Certain Broadcast Stations Serving Communities in the Miami, Florida Area,* 5 FCC Rcd 4893 (1990) (*Miami*), granting the renewal applications of Stations WTRS/WTRS-FM; (ii) a petition timely filed by Asterisk Communications, Inc. (Asterisk) for reconsideration of the Commission's decision to grant the license renewal for Stations WTRS/WTRS-FM subject to reporting conditions and a Notice of Apparent Liability for forfeiture of $18,000; (iii) NAACP's opposition to Asterisk's petition; and (iv) Asterisk's opposition to NAACP's petition and its reply to the NAACP's opposition. NAACP alleges that the above-cited stations violated our Equal Employment Opportunity (EEO) Rule and policies and that the Commission erred when it granted the stations' renewal applications. It requests that the Commission reconsider its decision, designate these applications for hearing and then deny renewal. Asterisk argues that the Commission acted arbitrarily and capriciously when it sanctioned the stations. It contends that the Commission did not fully consider the facts presented by Asterisk and that it imposed more severe sanctions on Asterisk than on other licensees in similar situations. Asterisk requests that the Commission reconsider the imposition of sanctions on its stations, or reduce the imposed forfeiture amount. For reasons discussed below, we deny the petitions filed by NAACP and Asterisk.

II. DISCUSSION

2. Reconsideration is appropriate where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters. *See WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). 47 C.F.R Section 1.106(c).

3. In *Miami*, the Commission noted: (1) Asterisk had 37 overall (34 upper-level) hiring opportunities from October 1, 1984, to October 1, 1988; (2) it received nine minority referrals from recruitment sources;[1] (3) it received a pool of minority applicants for only one position in an area with a 16.8% minority labor force; (4) despite its inability to attract a sufficient pool of minority applicants, it made no effort to contact minority-specific sources; (5) it hired two minorities for clerical positions and no minorities for upper-level positions; and (6) it apparently engaged in no self-assessment. Accordingly, the Commission imposed reporting conditions and issued a Notice of Apparent Liability of Forfeiture of $18,000.

NAACP's Petition for Reconsideration

4. NAACP argues that the renewal applications of WTRS/WTRS-FM should have been set for hearing to determine whether the licensee engaged in discrimination. It contends that the Commission relied on immaterial and irrelevant information in mitigation of an EEO record which, standing alone, could not have happened but for discrimination. NAACP argues that the Commission ignored its statistical showing that the stations engaged in employment discrimination. In its Reply, NAACP further elaborates on its statistical argument which, it contends, constitutes a *prima facie* case of discrimination. In addition, it argues that the Commission overlooked its unrebutted assertion in its Comments that the only occasion on which the licensee actively recruited and interviewed minorities was for a secretarial position occurring when the need to file renewal applications was imminent. It also contends that the Commission erroneously failed to determine, in light of the licensee's inability to attract minorities for upper-level positions, whether the licensee's recruitment and selection practices evidenced "that the licensee believes Blacks only to be suitable for menial labor," as the Commission found in *Rust. See Rust Communications Group*, 53 FCC 2d 355 (1975). Moreover, NAACP argues that the Commission erroneously failed to consider whether discriminatory intent was evidenced by the licensee's assertion regarding the unwillingness of minorities to travel the distance to the stations.

Asterisk's Opposition

5. In response, Asterisk argues that "the FCC is not the Equal Employment Opportunity Commission (EEOC) and a license renewal proceeding is not a Title VII suit." It notes that because the Commission's affirmative action policy is prospective, unlike the EEOC which aims primarily at remedying the effects of past discrimination, the Commission rarely designates renewal applications for hearing solely to investigate affirmative action performance. The licensee acknowledges that a hearing may be warranted where responsible and well pleaded claims of discrimination have been made, but argues that NAACP did not make such claims in this case.

[1] The *MO&O* inadvertently listed nine minority referrals. The licensee actually listed 10 minority referrals in its renewal applications.

6. The licensee contends that the statistics contained in NAACP's reply comments and on which NAACP bases its claims of discrimination, are inaccurate as well as irrelevant to this proceeding. It argues that NAACP used incomplete and often nonexistent data to perform its calculations. In addition, it contends that the state labor force data used by NAACP in its calculations is not the same labor force data the Commission uses when analyzing a station's EEO program. Finally, the licensee contends that "evidence of statistical disparity between the number of minority employees and the number of minorities in the relevant workforce is not, in and of itself, sufficient grounds to order the FCC to conduct a hearing." *See National Black Media Coalition v. FCC,* 775 F.2d 342, 358 (D.C. Cir. 1985).

7. The licensee disputes NAACP's contention that it only recruited minorities for lower-level positions. It notes that, although it was unsuccessful at attracting qualified minority applicants for upper-level positions, it sent general and specific job notices to general and minority sources for upper-level vacancies. Moreover, it adds that in light of the low percentage of minorities in the Ocala area, it only needed 1.2 minority employees in upper-level jobs during most of the license term to meet the processing guidelines. It also notes that minorities comprised 50% of all full-time lower-level hires and 63% of all applicants for full-time lower-level vacancies.

8. Contrary to NAACP's contentions, Asterisk states that its case is not similar to *Rust, supra,* in which the Commission designated renewal applications for hearing. It argues that, unlike the licensee in *Rust,* it contacted general and minority sources for specific vacancies and that there is no evidence of overt discrimination in this case.

Discussion

9. Upon review of the NAACP's petition for reconsideration and the licensee's opposition, we find that reconsideration is not appropriate. Regarding NAACP's argument that the Commission failed to consider the statistical arguments made in its reply to the licensee's inquiry response, we have reviewed NAACP's argument and find that it does not support the relief requested.

10. NAACP used a statistical argument which, as the licensee correctly argues, the Commission does not employ. The statistics calculated by NAACP are not based on the Commission's EEO guidelines but, as indicated by NAACP, are based on computations used in cases brought under Title VII of the Civil Rights Act, 42 U.S.C. Section 2000e-(2)a. *See Amendment of Part 73 of the Commission's Rules concerning Equal Employment Opportunity in the Broadcast Radio and Television Services,* 2 FCC Rcd 3967 (1987) (*Broadcast EEO) petition for reconsideration pending.* A statistical disparity alone is not sufficient grounds to order a hearing. *See NBMC v. FCC, supra.* When challenging a renewal, a petitioner must establish that granting the renewal is *prima facie* inconsistent with the public interest. 47 U.S.C. Section 309(d)(1). NAACP did not meet this standard. Its claim of discrimination is based solely on hiring and applicant flow statistics derived from Title VII methodology which is not the standard for analysis under Section 309(d)(1). NAACP should have addressed the Commission's EEO guidelines that focus on the licensee's efforts to implement an effective EEO program. Furthermore, NAACP's contention that we should determine if the licensee's argument -- that it was unable to hire minorities because it was too distant from high minority concentrations -- is indicative of discriminatory intent is also without merit. The Commission's evaluation of the licensee's EEO record as a whole, including consideration of the licensee's distance argument as well as other factors, did not raise an inference of discrimination. Therefore, absent additional evidence suggesting discriminatory intent, a *prima facie* case of discrimination was not raised.

11. Finally, we reject NAACP's argument that this case is similar to *Rust, supra.* In that case, the Commission designated the renewal applications for hearing because the licensee indicated that it would contact minority organizations only "where feasible" or "when suitable openings exist[ed]" and allegedly made discriminatory remarks to one minority applicant. Here there is no evidence that the licensee engaged in any such overt discrimination as occurred in *Rust.* Accordingly, NAACP's petition for reconsideration is denied.

Asterisk's Petition for Reconsideration

12. First, Asterisk argues that the Commission ignored its showing that it received minority referrals from general sources and received 10 minority applicants among 37 total applicants for seven vacancies during the reporting year. It also contends that the Commission's finding that only the 1988 receptionist vacancy produced minority applicants contradicts its showing that it received 10 applications from minorities, only six of which were for the receptionist position. Moreover, it notes that it hired a minority for a position in 1985 and attracted four minorities for a position in 1987.

13. Second, Asterisk contends that in criticizing its failure to contact minority-oriented sources, the Commission erroneously assumed that such sources existed in Dunnellon despite its showing to the contrary. Third, Asterisk argues that the Commission erroneously found that it did not engage in self-assessment during the license term, despite evidence to the contrary.[2] Fourth, it argues that the Commission erred in determining that its EEO record was similar to WBBE/WMGB-FM in Georgetown, Kentucky, *See Renewal of Licenses of Stations WBBE/WMGB-FM, Georgetown, Kentucky,* 4 FCC Rcd 8255 (1989). Asterisk contends that, unlike the licensee of WBBE/WMGB, it contacted recruitment sources,[3] for specific vacancies; engaged in self-assessment; received minority applicants; and hired two minorities for full-time vacancies.

---

[2] The licensee alleges in its opposition to NAACP's petition to deny and its petition for reconsideration that its self-assessment included: instructing station managers to fill a new position with a minority, if at all possible; making special arrangements to adapt the work schedule to the needs of minority applicants; using sources outside of its EEO program on a regular basis; delaying the hiring of a new employee for up to two months in hopes of finding qualified minority applicants; sending general letters to recruitment sources requesting minority applicants, but without listing specific vacancies; and modifying the stations' recruitment list.

[3] In a declaration, a former general manager states that the Ocala Branch of the NAACP as well as the other minority organizations, were sources to "be added to our program ...." *See* Declaration of Frederick H. Igham, dated February 13, 1989; *see also* Amendment to Model EEO Program Report, Form

14. Finally, the licensee argues that its EEO record is similar to or less egregious than WMMZ(FM) Ocala, FL. *See Miami, supra.* The licensee notes that WMMZ is located within the same MSA as WTRS/WTRS-FM and the licensee of WMMZ also failed to contact minority sources. It also states that its record is similar to or less egregious than KVII-TV, Amarillo, Texas. *See Applications of certain broadcast stations serving communities in the state of Texas,* 4 FCC Rcd 6685 (1989). In both cases, the licensees received reporting conditions.

NAACP's Opposition

15. NAACP contests the licensee's assertions that no minority organizations were available to it and notes that it has had a local branch in Ocala, Florida for over three decades. It also criticizes Asterisk's failure to establish its own network of minority referral sources in light of its claims that no minority organizations existed.

Asterisk's Reply

16. Asterisk argues that NAACP's failure to respond to Asterisk's argument that the Commission unfairly treated Asterisk compared with other licensees constitutes agreement with the assertion. Next, it contends that NAACP mischaracterized its argument regarding the lack of minority sources. Contrary to NAACP's contention, Asterisk maintains that it did not state that there were no minority sources in Ocala, but rather that there were none in Dunnellon. It argues that it previously showed that the two communities are separate and not synonymous in terms of recruitment sources; that the commute from Ocala to Dunnellon was difficult in that it could take upwards of two hours; and that the majority of its applicants have come from the immediate Dunnellon and Citrus areas.

Discussion

17. We find the licensee's argument that its efforts were improperly evaluated to be without merit. As noted in *Miami,* the Commission considered Asterisk's use of general sources and evidence of minority referrals from these sources. *See Miami,* at 4901, n.26. Moreover, the minority hire in 1985 and minority applicants for the clerical position in 1988 were also duly considered. In addition, we find no merit in the licensee's allegation that we did not consider four additional minority applicants it claims to have received during the reporting year. Other than the six minorities attracted for the 1988 clerical position, the licensee's pleadings list no other minority applicants for vacancies filled during the reporting year. With respect to the minority applicants the licensee states were attracted in 1987, the licensee's opposition, which lists these four minority applicants, never identifies the specific position for which these minorities were considered. The inquiry response lists minority applicants for only the 1985 and 1988 vacancies noted above and does not mention minority applicants in 1987. Finally, the licensee's argument and showing of no minority sources in Dunnellon is insufficient. The licensee acknowledges that there are minority-specific sources in Ocala. *See* para. 12, n.3 and para. 14, *supra.* The appropriate labor force for recruitment by WTRS is the Ocala, MSA of which Dunnellon is a part. The licensee did not request nor would its showing have constituted a basis for an alternative labor force request. In light of all the above, the Commission evaluated the licensee's efforts, found them wanting and imposed appropriate sanctions. We affirm that decision.

18. Next, we find the licensee's argument that the Commission erroneously ruled that the licensee engaged in no self-assessment until the end of the license term despite evidence to the contrary to be without merit. Licensees are expected to continually evaluate their EEO efforts to recruit minorities and to take corrective action when qualified minorities are not present in the applicant pool for specific vacancies. *See* 47 C.F.R Section 73.2080 (b) and (c). Most of the examples which the licensee alleges to have used intermittently do not constitute self-assessment as contemplated by our EEO Rule. Although the licensee states that it continuously modified its program, its EEO record reveals no evidence of such modification until the end of the license term when it added new sources to its list.

19. Third, we disagree with Asterisk's argument that its record is less egregious than the records of Stations WBBE/WMGB-FM, WMMZ(FM) and KVII(TV). The licensee of WBBE/WMGB-FM failed to contact minority-oriented sources for its 53 full-time vacancies but instead sent out mass mailings to recruitment sources without listing specific vacancies. Moreover, the licensee failed to include minorities in the applicant pool in an area with a 9.2% Black labor force. This licensee did hire a minority for an upper-level position (a Black salesworker who was referred by an advertisement in a local newspaper). Despite this record, the licensee made no attempt to remedy its unproductive program until the end of the license term. *See WBBE/WMGB-FM, supra.*

20. Similarly, the licensee here did not contact minority-oriented sources despite its record of attracting few minority applicants. Moreover, like the licensee of WBBE/WMGB-FM, the licensee here did not engage in meaningful self-assessment until the end of the license term. Although the licensee hired two minorities (a Black receptionist in 1985 and a Black receptionist in 1988), unlike the licensee of WBBE/WMGB-FM, it hired no minorities for upper-level positions.

21. As for WMMZ(FM) and KVII(TV), Asterisk inappropriately focuses on limited aspects of these stations' EEO records, rather than studying the records as a whole.[4] Contrary to its assertions, the licensee's EEO efforts and those

---

396-A, dated May 15, 1989. There are no further declarations from the licensee which support the representation in the opposition to the NAACP's petition for reconsideration, that the licensee actually contacted minority sources.

[4] We disagree with Asterisk's contention than we failed to apply a consistent standard of review and, therefore, should reconsider our decision in this case and, at a minimum, eliminate the $18,000 forfeiture. As we stated in *License Renewal Application of Congaree Broadcasters, Inc. for Station WSCQ-FM, West Columbia, South Carolina,* 5 FCC Rcd 7691 n.6 (1990), in all our decisions, "we focus on the licensee's efforts to recruit, employ and promote women *and* minorities and the licensee's ongoing self-assessment of its EEO efforts." Factors that we consider in our analysis "include, but are not limited to, the EEO renewal program, the number of full-time hiring opportunities and the efforts made to fill those vacancies, documentation of those efforts, the licensee's assessment of those efforts, the length of the licensee's tenure and the employment profile during the license term." *Id; License Renewal Application of Eastern Carolina Broadcasting Company, Inc., Former Licensee of Stations WGBR(AM)/WKTC(FM) Goldsboro, North Carolina,* 6 FCC Rcd 6154 (1991).

of the other cited stations differed significantly, thus warranting different sanctions and remedies. The licensee of WMMZ(FM) contacted numerous general recruitment sources which resulted in the appearance of 26 minorities in the interview pool for the station's 32 vacancies and hired a minority for an upper-level position. However, the licensee here, which contacted some of the same sources as WMMZ(FM), received a total of seven minority applicants for lower-level positions while it failed to attract and/or hire minorities for any upper-level positions. The licensee of KVII-TV filled only 17 vacancies and included minorities in four applicant pools in an area with a 13.5% minority labor force as compared with the licensee here which filled 37 vacancies and had only one applicant pool of minority applicants in an area with a 16.8% minority labor force.

22. Upon review of the licensee's petition for reconsideration, NAACP's opposition and the licensee's reply, we find that reconsideration is not appropriate here. The licensee failed to show additional facts not known or not existing until after the licensee's last opportunity to present such facts. In addition, although it argued material error in *Miami*, we did not find its arguments persuasive. Accordingly, the licensee's petition for reconsideration is denied.

III. CONCLUSION

23. We note that the factors which we take into account when determining the amount of a forfeiture penalty include the nature, circumstances, extent and gravity of the violations and, with regard to the violator, the degree of culpability, any history of prior offenses, ability to pay and such other factors as justice may require. 47 C.F.R. Section 1.80(b)(1). After consideration of all these factors and taking into account the arguments put forth in the NAACP's and the licensee's petition, as addressed above, we find that original *Order* imposing a forfeiture of $18,000 and reporting conditions is appropriate.

IV. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by the NAACP against WTRS/WTRS-FM IS DENIED.

25. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by Asterisk Communications, Inc. IS DENIED and, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b), that Asterisk FORFEIT to the United States the sum of eighteen thousand dollar ($18,000) for failing to comply with the Commission's EEO Rule. 47 C.F.R. Section 73.2080. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80 and Section 504(a) of the Communications act, as amended, 47 U.S.C. Section 504(a), as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

CHAPMAN S. ROOT REVOCABLE TRUST — File No. BPH-850305IG

For Construction Permit
to Modify the Facilities of
WEZY-FM, Lakeland, Florida

MEMORANDUM OPINION AND ORDER

Adopted: May 27, 1993; **Released: June 7, 1993**

By the Commission:

1. The Commission has before it (a) an Application for Review, filed on January 24, 1992, by Edens Broadcasting, Inc. (Edens); (b) an Opposition to Application for Review by Chapman S. Root Revocable Trust (Trust) filed on February 10 1992; and (c) a Reply by Edens filed on February 25, 1992. Edens seeks review of the Mass Media Bureau's grant of the above captioned application.

2. Edens is the licensee of WRBQ-FM, Tampa, Florida. Edens had filed an application to modify the facilities of WRBQ-FM. This application was short-spaced to the above captioned application (File No. BPH-830714AT). In *Edens Broadcasting, Inc. (WRBQ-FM)*, 5 FCC Rcd 2576 (1990), *recon. denied*, 6 FCC Rcd 4327 (1991), we affirmed the Review Board's *Decision*, 2 FCC Rcd 689 (1987), denying Edens' application for modification of WRBQ-FM's facilities. Edens requests that the Commission set aside the Bureau's grant of Trust's application until the United States Court of Appeals for the District of Columbia Circuit acts on Edens' appeal of the Commission's denial of its construction permit application (Case No. 91-1387).

3. We will deny Edens' Application for Review. Edens' appeal has been denied. *Edens Broadcasting Inc. v. F.C.C.*, 966 F.2d 701 (1992). Consequently, Edens' request is now moot.

4. ACCORDINGLY, IT IS ORDERED, That the application for review filed by Edens Broadcasting, Inc. on January 24, 1992 IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Implementation of the Cable Television Consumer Protection and Competition Act of 1992	**MM Docket No. 92-259**
Broadcast Signal Carriage Issues	
Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates	**MM Docket No. 90-4**
Request by TV 14, Inc. to Amend Section 76.51 of the Commission's Rules to Include Rome, Georgia, in the Atlanta, Georgia, Television Market	**MM Docket No. 92-295** RM-8016

ORDER

Adopted: May 26, 1993; Released: May 27, 1993

By the Commission:

1. On March 11, 1993, the Commission adopted a *Report and Order* [1] in this proceeding to implement the mandatory television broadcast signal carriage ("must-carry") and retransmission consent provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act").[2] By this *Order*, the Commission denies a Petition of the National Cable Television Association for a Stay Pending Reconsideration or, Alternatively, Pending Review and a Request for Stay submitted by Yankee Microwave, Inc.[3] Both petitions request that the Commission stay the effective date of specific provisions of the new rules until consideration of the petitions for reconsideration.

2. *NCTA Petition.* In its May 3, 1993, petition, the National Cable Television Association ("NCTA") seeks a postponement of the requirement that cable operators add stations to come into compliance with the new must-carry rules. Specifically, NCTA seeks to postpone the application of the rules from June 2 until October 6 or the date a decision on reconsideration becomes effective, whichever is earlier. During this period, NCTA would require continued carriage of any must-carry eligible station that was carried on the date the stay is issued. NCTA argues that the Commission implementation schedule for its new must-carry/retransmission consent rules exceeds the requirements mandated by Congress, which only required that the new rules be issued within 180 days of enactment of the 1992 Act, and will impose unnecessary burdens on cable operators. In particular, NCTA asserts that cable operators may be required to change their channel line-ups three times in five months: (1) on June 2; (2) at some interim point when a station resolves a signal quality or copyright liability issue or is declared "local" for must-carry purposes by the Commission; and (3) on October 6.

3. NCTA also states that there is a need to resolve several of the issues it raises in its petition for reconsideration before cable operators begin carriage of must-carry signals. These issues include a revised definition of "substantial duplication;" a time limit for broadcasters' must-carry demands; and several changes to the provisions regarding the carriage of retransmission consent signals, such as the manner of carriage, that may affect negotiations between cable operators and broadcast licensees. NCTA contends that if changes are made to these aspects of the rules when the Commission acts on the reconsideration petitions, the requested relief may come too late for cable operators that may have already dropped cable programming services to meet their must-carry obligations. NCTA claims that, under this implementation schedule, the balance of hardship falls on cable operators since the vast majority of broadcast stations have been carried voluntarily by cable systems in the absence of must-carry rules. NCTA states that at most some broadcast station may have to wait a few months before gaining carriage. The petitioner argues that these broadcasters have not suffered harm in the past and, unlike the non-broadcast programming services that they will displace on cable systems, can be viewed by consumers over-the-air. Finally, NCTA asserts that the current implementation schedule is likely to cause confusion and be disruptive for subscribers.

4. In their opposition, the National Association of Broadcasters and the Association of Independent Television Stations ("NAB/INTV") argue that the petition should be denied because of NCTA's delay in seeking relief until after the first implementation date (April 2) and on the date of the first affirmative obligation for cable operators (May 3). NAB/INTV state that NCTA fails to demonstrate that it is likely to succeed on the merits since the requested changes to the rules have already been considered and rejected. According to petitioners, the claimed injuries to cable operators are speculative and have been considered and rejected by both the District Court and the Supreme Court. These parties assert that if the stay were granted, the balance of hardships would shift to broadcasters and the public. NAB/INTV contend that the Commission should compare NCTA's claims of inconvenience to some number of systems to the economic and other losses non-carried stations would suffer from the delay of enforcement of their statutorily guaranteed carriage rights. Furthermore, NAB/INTV assert that a delay of the implementation dates would harm the public interest by depriving cable subscribers of signals that Congress has determined advance the public interest and would place additional, unnecessary burdens on the Commission to develop a new schedule.

---

[1] *Report and Order* in MM Docket No. 92-259, 58 FR 17350 (April 2, 1993).

[2] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] On May 10, 1993, the Commission received an Opposition of the National Association of Broadcasters and the Association of Independent Television Stations, Inc. to the Petition of National Cable Television Association for a Stay Pending Reconsideration, or Alternatively Pending Review.

5. We deny NCTA's petition for stay. The Commission's concern with the development of an appropriate implementation schedule that would balance the interests of all parties in the time frame set forth by Congress began with the *Notice of Proposed Rule Making* in this docket.[4] Based on the comments in response to the *Notice*, the Commission adopted a timetable that balances the interests of broadcast stations and cable systems, that fulfills the requirements of the 1992 Cable Act, that attempts to implement the statute promptly and that endeavors to minimize disruption in an area where disruption is inevitable.[5] Specifically, as stated in the *Report and Order*, we believe that Congress intended for us to implement the must-carry provisions without delay.[6] In addition, several implementation dates were selected to accommodate the October 6 date for commencement of retransmission consent and the necessary actions, such as notifications, that must be taken prior to that time.[7]

6. The Commission was aware that one consequence of its implementation schedule might be that a cable operator could be required to change its system's channel line-up more than once in less than a year. To minimize the extent of such reshuffling, we chose the effective date for channel positioning to coincide with October 6, 1993, effective date for carriage of stations pursuant to retransmission consent agreements. Thus, under the established schedule, must-carry signals currently carried can remain in place on their existing channel positions until October, and stations that are added can be positioned at the convenience of the cable operator.[8] We do not find that NCTA has provided evidence to support its claim that the impact of this timetable on cable operators and programmers outweighs the carriage rights that Congress conferred upon broadcast licensees. Indeed, as the legislative history of the 1992 Act indicates, Congress determined that broadcast stations have experienced harm since the Commission's must-carry rules were invalidated and that statutorily-mandated carriage provisions were a necessary remedy.[9] This finding was upheld by the three judge panel of the District Court.[10] Furthermore, and most importantly, NCTA has not demonstrated irreparable injury. The assertion of harm to cable systems alleged by NCTA is unsupported by facts and contradicts NCTA's claim that cable operators are already carrying most of the television stations that are entitled to must-carry status. We should note that Congress determined that subscribers have experienced channel line-up changes before at cable operators' sole discretion and acted to reduce this practice. Finally, the 30-day notice provisions of our rules will ensure that cable subscribers are aware of such occurrences well before they take place.[11] Accordingly, we believe that NCTA has not met the requirements for a stay.[12]

7. *Yankee Petition.* On May 3, 1993, Yankee Microwave ("Yankee") filed a Request for Stay of the effective date of the retransmission consent rules, specifically the rule concerning the superstation exemption.[13] Yankee contends that the new rules unfairly provide an exemption from the retransmission consent requirements for superstations delivered via satellite, but not the same signals delivered by microwave or other video distribution systems. Yankee, which is a microwave deliverer of such signals, claims that cable systems have already notified it of their intent to switch to satellite delivery of superstations in order to avoid the need to get retransmission consent for carriage of these signals. Yankee argues that there is no reason to prefer satellite delivery of such signals over microwave carriers and that the legislative history indicates that Congress intended to grandfather all qualified superstations. The petitioner asserts that it will suffer irreparable injury if the stay is not granted and that a brief stay will not harm the superstations or the small percentage of cable systems that receive superstations via microwave. Finally, Yankee asserts that the purpose of the 1992 Act is to promote competition in the video marketplace and protect consumers from monopoly rates and anti-competitive practices. The rule as written, according to Yankee, is contrary to that goal.

8. At issue in Yankee's request for stay is the superstation exemption, a part of the retransmission consent rules which will not affect the offering of cable service until October 6, 1993. Thus, the Commission has sufficient time to consider and rule on this issue in its Order addressing the reconsideration petitions and associated pleadings received in this proceeding prior to that effective date. Moreover, the evidence provided by Yankee regarding the extent to which signals will be delivered by satellite instead of microwave is speculative and it is unclear whether cable systems will actually change the delivery system used to receive such signals.[14] Accordingly, Yankee has not demonstrated that a stay is needed to avoid irreparable harm during this interim period. Therefore, we deny Yankee's motion for stay.

9. Accordingly, IT IS ORDERED pursuant to Sections 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j) and 303(r), that the Petition of the National Cable Television Association for a Stay Pending Reconsideration or, Alternatively, Pending Review and the Request for Stay submitted by Yankee Microwave, Inc. ARE DENIED.

---

[4] *See Notice of Proposed Rule Making* in MM Docket No. 92-259, 7 FCC Rcd 8055 at 8066-80 67 (1992).

[5] *See Report and Order* at paras. 149-157.

[6] *See Report and Order* at para. 153.

[7] *See Report and Order* at paras. 152, 155-156.

[8] *See Report and Order* at paras. 88, 154.

[9] *See* Section 2(a)(16) of the 1992 Cable Act. *See also* Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 92, 102 Cong., 1st Sess. (1991) (Senate Report) at 41-46.

[10] *Turner Broadcasting Systems, Inc. v. Federal Communications Commmission*, No. 92-2247, slip op. at 14-15 (D.D.C. April 8, 1993), *appeal pending*, No. A-798 (U.S., filed April 19, 1993).

[11] 47 C.F.R §§ 76.58(a) and 76.309(c)(3)(A)(2).

[12] *See generally Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921 (D.C. Cir. 1958); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

[13] 47 C.F.R. § 76.64(b)(2).

[14] In a May 6, 1993, supplement to its petition for reconsideration, Yankee cites one possible situation where a satellite provider is contacting cable systems in this regard.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 25, 1993

COMMISSION GIVES INSTRUCTIONS CONCERNING ANSWER TO PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC IN SCHURZ COMMUNICATIONS, INC. V. FCC NOS. 91-2350, *et al.*

On December 21, 1992, the Coalition to Preserve the Financial Interest and Syndication Rule and the Arizona Consumers Council filed a Joint Petition for Rehearing and Suggestion for Rehearing *En Banc* in the case of *Schurz Communications, Inc.* v. *FCC,* Nos. 91-2350, *et al.* The Court on January 12, 1993 requested parties to file an answer to the petition by January 26, 1993.

In response, the Commission instructed the General Counsel to file an answer with the United States Court of Appeals for the Seventh Circuit supporting the petition. The Commission agreed with the Joint Petitioners that the case should be reheard because it is a case "of exceptional importance" and because "the panel improperly substituted its own views as to the preferable regulatory scheme for the conclusions of the expert agency and because the panel vacated longstanding regulations that the agency had determined were critical to preserving the public interest in broadcast program diversity."

Action by the Commission January 25, 1993 by Public Notice (FCC 93-50). Commissioners Marshall, Barrett and Duggan, with Commissioner Quello dissenting and issuing attached statement.

Dissenting Statement of Commissioner James H. Quello.

In Re: Answer to Petition for Rehearing filed in *Schurz Communications, Inc. v. FCC*, No. 91-2350 (7th Cir.).

On January 12, 1993, the Court directed counsel for Schurz Communications, Inc., *et al.* to answer a *Petition for Rehearing* ("*Petition*") filed by the Coalition to Preserve the Financial Interest and Syndication Rule, *et al.* in *Schurz Communications, Inc. v. FCC*, No. 91-2350 (7th Cir.). I believe it is inappropriate for the Commission to respond to the January 12 *Order*, both under its express terms and under the Court's operating procedures. There should be at least some recognition of the fact that this is a party to which the Commission was not invited. I also oppose the Commission's participation because the *Petition for Rehearing* is wrong on the merits. Consequently, I dissent from the decision to direct the General Counsel to file a response.

The unambiguous terms of the January 12 *Order* should have been sufficient to alert the majority that no Commission response was necessary. The *Order* is directed to "Schurz Communications, Incorporated, et al." and it states that "[c]ounsel are requested to file an *answer* to said petition on or before 1/26/93." (emphasis added). This clearly is a request for briefs opposing the Petition, and not symbolic "me too" pleadings. The Court's operating rules support this reading of the *Order*. They specify that when an answer to a petition for rehearing is requested, "the clerk shall notify the prevailing Party that an answer shall be filed within 14 days. . . ." IOP 5(a). Under no stretch of the imagination could the Commission be considered the "prevailing party" in this case. And I cannot fathom how more verbiage from this agency will assist the Court in its deliberations.

Additionally, the assumptions underlying the Petition are plainly wrong. To begin with, it is based on a distorted reading of the December 7 Opinion. The Petition

misquotes the Court when it states that "the panel has decided that no regulation is 'preferable' to continued regulation." *Petition* at 6, misquoting Dec. 7 Opinion at 4. *See also id.* at 4. Petitioners ignore the five options outlined in the December 7 Opinion, ranging from vacating only the 1991 rules to vacating all rules. The Court avoided the most extreme alternatives, holding only that it was "preferable" to adopt essentially the remedy advocated by the Commission majority: allowing the 1991 rules to remain effective for a brief time to permit the FCC to conduct a remand proceeding. From an institutional perspective, it is a little rude for the majority now to complain after being given, for the most part, what it said it wanted.

On the merits, the Petitioners' (and the FCC majority's) assertion that the Court impermissibly substituted its judgment for that of the agency is similarly flawed. This view of the prevailing law leaves little room for judicial review. Indeed, it ignores that the Commission's wide latitude to make policy based upon predictive judgments implies a correlative duty to demonstrate that the policy actually produces the expected results. *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992). It is "axiomatic" that "an agency's action will be set aside by a reviewing court whenever the agency fails to provide a reasoned basis for its decision." *Flagstaff Broadcasting Foundation v. FCC*, No. 91-2396, slip op. at 7 (D.C. Cir., Dec. 4, 1992) citing *Motor Vehicle Assn. v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43 (1983). That the Commission's decision lacked a reasoned basis was more than amply exposed by the panel's November 5, 1992 Opinion.

Petitioners' argument also ignores history. The U.S. Court of Appeals for the D.C. Circuit was presented with a very similar case in *Home Box Office, Inc. v. FCC*, where it set aside the Commission's "pay cable" rules. 567 F.2d 9 (D.C. Cir.) *cert. denied*, 434 U.S. 829 (1977). In an interconnected series of rulemaking proceedings, the Commission had adopted rules restricting the types of feature films and sporting events that could be shown on premium cable channels and subscription broadcast

stations. The goal of the rules was to prevent "siphoning" of programming away from conventional television stations.

Like the finsyn rules, the pay cable regulations had as their goal "increas[ing] program diversity." *Id.* at 25. And, like the *Report and Order* at issue here, the Commission attempted to justify the pay cable rules with "conclusory phrases," such as claiming that the regulations would "enhance the integrity of broadcast signals." *Id.* at 28 (citation omitted). The Court found that the Commission's "generalities" crossed "the line from the tolerably terse to the intolerably mute." *Id.* Additionally, the Court found the rules to be unsupported by the record, *id.* at 37-40, illogical, *id.* at 40-42, and in conflict with other Commission policies. *Id.* at 28-32, 43.

In short, the comparison to the finsyn proceeding is complete. Yet there is one final, almost eerie, similarity. Because the pay cable orders under review "amend[ed] previous, more stringent . . . rules," *id.* at 17, various parties urged the Court not to eliminate the regulations but to confine its inquiry to "the rather limited question of the validity of the relaxation of prior Commission rules." *Id.* at 22 n.27. Nevertheless, the Court upheld subscription television rules but "vacate[d] the orders as arbitrary, capricious, and unauthorized by law in all other respects." *Id.* at 18.

Given this context, Petitioners' suggestion that "the panel could not properly bifurcate the Commission's order," Petition at 8, falls flat.[1] Not only does the Court have clear authority to uphold the Commission's deletion of the 1970 rules, such a

[1]Petitioners' authority for this novel position is a 1985 Court of Appeals decision by (then) Judge Scalia on the subject of curtailment plans for a natural gas pipeline. *See North Carolina v. FERC*, 730 F.2d 790 (D.C. Cir. 1984). But in that case, the Court dealt with a series of compensation arrangements that the agency expressly stated were "not severable." *Id.* at 796 (quoting FERC order). Nothing in that (or any other) decision suggests that a reviewing court may not vacate part of an order while upholding other parts. Judge Scalia issued such an order one year later in *Illinois Commerce Commission v. Interstate Commerce Commission*, 776 F.2d 355 (D.C. Cir. 1985). There, in reviewing ICC rule amendments governing abandonment of railroad lines and permissible subsidies to avoid abandonment, the Court vacated "that portion of the regulation applicable to labor costs in subsidy determinations and [upheld] the portion applicable to labor costs in abandonment determinations." *Id.* at 360. *See also id.* at 360-61 ("We vacate and remand the regulation insofar as it governs subsidy calculations and uphold it insofar as applied to abandonment.").

ruling would be consistent with the Commission's intent. It is beyond dispute that the Commission has no interest in reviving the old regulations. For almost a decade the Commission has believed that the rules are obsolete.[2] I am the only member of the Commission that was present for the 1983 *Tentative Decision* to eliminate the rules. I dissented at the time, because I felt the networks wielded sufficient market power to justify Commission concern. But with the vast changes in the media environment that were so thoroughly documented by the current record, I concluded that my concerns were no longer valid.[3] Given my status as the last hold-out to support the 1970 finsyn rules, I can testify that it is long past time to eliminate them. In any event, any doubt about the Commission's intent can be resolved in the latest rulemaking proceeding, which already has commenced, without the need for rehearing by the Court.

For these reasons, I believe there is no basis for the Court to grant the *Petition for Rehearing*.

---

[2]*See Tentative Decision and Request for Further Comments in Docket 82-345*, 94 F.C.C.2d 1019 (1983). Counting the extensive staff study of the rules published in 1980, the Commission's repudiation of the rules goes back even farther. FINAL REPORT OF THE NETWORK INQUIRY SPECIAL STAFF (1980).

[3]*See Evaluation of the Syndication and Financial Interest Rules*, 6 FCC Rcd. 3094, 3216-19 (1990) (Dissenting Statement of Commissioner Quello).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 28, 1993

COMMENT REQUESTED ON SUPPLEMENTAL ALCATEL FILING (ET Docket No. 92-9)

In the *Further Notice of Proposed Rule Making* in ET Docket No. 92-9, the Commission proposed channelizing five microwave bands above 3 GHz to accommodate licensees currently using 2 GHz frequencies under consideration for use by Personal Communications Services and other emerging technologies.[1] On May 20, 1993, Alcatel Network Systems, Inc. (Alcatel) filed supplemental comments amending its previous channelization proposal for these five bands. Alcatel had recommended a 1.6 MHz-based plan, but now is proposing a 1.25 MHz-based plan that has elements in common with the 1.25 MHz-based plan recommended by the Telecommunications Industry Association (TIA) and three equipment manufacturers (Harris Corporation-Farinon Division, Digital Microwave Corporation, and Telesciences, Inc.; collectively, Joint Commenters). Alcatel states that its revised plan synthesizes its original plan and that proposed by TIA and the Joint Commenters.

The Commission will accept comments on Alcatel's supplemental comments through June 14, 1993. Alcatel's supplemental comments are available for inspection in the ET Docket No. 92-9 file at the FCC Reference Center (Room 239), 1919 M Street N.W., Washington, DC 20554. Copies may also be obtained from International Transcription Service, Inc., (202) 857-3800. For further information, contact Rodney Small, (202) 653-8116.

---

[1] *See Further Notice of Proposed Rule Making*, ET Docket No. 92-9, 7 FCC Rcd 6100; *First Report and Order and Third Notice of Proposed Rule Making*, ET Docket No. 92-9, 7 FCC Rcd 6886; *Notice of Proposed Rule Making*, GEN Docket No. 90-314 and ET Docket No. 92-100, 7 FCC Rcd 5676 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 1, 1993

CALL FOR CLUB AND MILITARY RECREATION STATION CALL SIGN ADMINISTRATORS

On May 11, 1993, the Commission adopted an *Order* (FCC 93-249) that authorizes it to use volunteer organizations for the purpose of providing amateur service club and military recreation station call signs. In the *Order*, the Commission delegated authority to the Chief, Private Radio Bureau, to execute agreements with qualified organizations that desire to provide services to the Commission as a club and military recreation station call sign administrator.

The purpose of this Public Notice is to announce that the Chief, Private Radio Bureau, will accept requests from organizations interested in becoming an administrator beginning July 26, 1993. Requests received before this date will not be considered. Organizations interested in becoming an administrator should familiarize themselves with the Commission's *Order* before applying.

Each organization requesting designation as an administrator must provide the information specified in Section 97.29 of the Commission's Rules, 47 C.F.R. § 97.29 (a) through (k). Additionally, the organization must include a listing of the twenty-six possible call sign blocks (NA through NZ) in descending order of preference. Requests will be processed in the order received at the address given below. Each administrator will be assigned the first available block of call signs based on its preference listing.

All requests must be signed by a responsible official of the organization and include the telephone number of a person familiar with the request. Requests must be sent to the Federal Communications Commission, Personal Radio Branch, Room 5322, Mail Stop 1700 C1, Washington, DC 20554, ATTENTION: CALL SIGN ADMINISTRATOR. Failure to follow these filing procedures will result in the request not being considered.

At a future date, we will announce by Public Notice the names and addresses of organizations that have been certified as a club and military recreation station call sign administrator.

For further information, call Maurice J. DePont at (202) 632-4964.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 1, 1993

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON REQUEST OF BELLSOUTH FOR WAIVER OF TARIFFING REQUIREMENTS FOR CERTAIN ONA SERVICES

CC Docket Nos. 88-2, Phase I, and 90-623

On May 13, 1993, BellSouth Telecommunications, Inc. (BellSouth) filed a request for waiver of the federal and state tariffing requirements for certain Open Network Architecture (ONA) services. BellSouth states that the waiver is necessary for BellSouth to comply with the Commission's requirements for structural relief.

On November 13, 1992, BellSouth filed a notice of compliance with the Commission's ONA requirements for removal of the structural separation requirements. The Commission has determined that the structural separation requirements will be removed when: 1) a BOC is technically prepared to offer each of its initial ONA services described in its ONA plan; 2) federal tariffs for each of its initial interstate ONA services are in effect; and 3) state tariffs for each of its initial intrastate ONA services have been filed.

BellSouth states that it is seeking a waiver of the tariffing requirements for several ONA services. BellSouth states that it will provide Real Time Access To Exchange Network Testing Facilities and Pass Through Diagnostics To User on an individual case basis. BellSouth will provide Monthly Detailed Recording on a deregulated contract basis and Clear Access To Derived Channel pursuant to an interstate tariff filing to be made no later than the end of the third quarter of 1993. BellSouth also seeks an indefinite waiver of the federal tariffing requirements for Statistical Multiplexer capability until such time as sufficient demand exists to encourage vendors to disclose the interface information necessary to deploy the requested service.

In addition, BellSouth seeks a waiver of the requirement that state tariffs be filed for several services. BellSouth states that the tariff for Clear Access to Derived Channel was temporarily delayed due to operational concerns and tariff scheduling problems, but BellSouth will file tariffs for this service no later than the end of the third quarter of 1993. BellSouth intends to offer Derived Local Channel, Real Time Access to Exchange Network Testing Facilities, and Pass Through Diagnostics To User on a special assembly/individual case basis to any customer who requests the services and will provide the services by way of a general tariff offering if sufficient demand materializes. BellSouth seeks a waiver for Statistical Multiplexer until such time as it identifies a multiplexer for which the interface could be standardized and sufficient demand exists to deploy the service. BellSouth states that Inhibit Third Number Call Billing to DID is available to customers throughout BellSouth's region at no charge upon request, with the exception of Florida where it is available for a tariffed charge. BellSouth requests a waiver to allow it to offer the service to ESPs and other customers at no charge. BellSouth states that tariffs for Data Over Voice service have been filed for all BellSouth states except North Carolina, where the tariff was temporarily delayed due to internal operational concerns and tariff scheduling problems. BellSouth plans to file a tariff for the service in North Carolina no later than the end of the third quarter of 1993.

Interested parties are to file comments on this request by **June 21, 1993,** and reply comments by **July 1, 1993,** with the Secretary, FCC 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the request can be obtained from ITS, Inc. at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally,* 47 C.F.R. §§1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Commission Carrier Bureau, at (202) 632-1300.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 28, 1993

TARIFF FILINGS MADE ON 14 DAYS' NOTICE

EFFECTIVE: May 6, 1993

On February 12, 1993, the Commission adopted a Report and Order (R&O) in CC Docket No. 92-117, Amendment to Section 1.773 of the Commission's Rules Regarding Pleading Cycle for Petitions Against Tariff Filings Made on 14 Days' Notice. The rule amendments made in this R&O, which adjusted the pleading cycle for petitions seeking investigation, suspension, or rejection of tariff filings made on 14 days' notice, became effective May 6, 1993.[1]

In order to allow the Commission time to evaluate arguments against the lawfulness of tariffs filed on 14 days' notice, the Commission now requires that petitions seeking investigation, suspension, or rejection of tariff filings be filed within *six* calendar days after the date of the filings; replies must be filed within *three* calendar days after the latest date that petitions could be filed. Because of the shortened pleading cycle for these tariffs, petitions must also be served in person or by facsimile on the filing carrier. Petitioners choosing service by fax must send a follow-up copy via first-class mail. Carriers retain the option to serve their replies to petitioners by mail. Finally, all letters of transmittal for 14-day tariff filings must include an address and designated individual for personal service and a fax number for fax service.

FEDERAL COMMUNICATIONS COMMISSION

[1] The R&O was published in the Federal Register on April 5, 1993 and became effective 30 days thereafter. *See*, 58 Fed. Reg. 17528 (Apr. 5, 1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 93-144

In the matter of

Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band	RM-8117, RM-8030, RM-8029

NOTICE OF PROPOSED RULE MAKING

Adopted: May 13, 1993; Released: June 9, 1993

Comment Date: July 19, 1993
Reply Comment Date: August 5, 1993

By the Commission:

I. INTRODUCTION

1. With this *Notice of Proposed Rule Making* (*Notice*), we examine ways to promote continued growth of the 800 MHz Specialized Mobile Radio (SMR) industry. We have observed a growing entrepreneurial interest in providing private land mobile service to wide geographic areas through the use of advanced technologies. Three pending petitions for rule making and numerous recent applications for waivers of Part 90 of our rules indicate that our current regulations may not be conducive to the development of innovative wide-area SMR operations. The petitioners, namely the National Association of Business and Educational Radio, Inc. (NABER), A&B Electronics, Inc. (A&B), and the American Mobile Telecommunications Association, Inc. (AMTA),[1] request that we modify our rules to facilitate the aggregation of substantial numbers of 800 MHz SMR channels at base station sites within a defined geographic area so that more efficient systems can be developed to offer a diverse array of mobile communications services to greater numbers of customers. We invite comment on methods of allowing wide-area and advanced system implementation while preserving the current success of 800 MHz SMR service.

II. BACKGROUND

2. Licensees in the Specialized Mobile Radio (SMR) Service operate private land mobile stations on a commercial basis.[2] The Commission initiated the SMR Service in the 806-821 MHz and 851-866 MHz bands in 1974 as part of a sweeping reallocation of spectrum to land mobile radio services.[3] As we developed rules to govern SMR operation, we envisioned that SMR systems would provide primarily dispatch service to eligible customers.[4] Therefore, while emphasizing our intent to maintain our flexibility to accommodate future technologies,[5] we generally designed Subpart S of Part 90 of our Rules to govern operations within limited local areas.[6]

3. Today, the 800 MHz SMR industry is no longer typified by small systems serving only local needs. In recent years we have observed a great deal of geographic market expansion through licensing, management agreements and corporate consolidation.[7] Licensees increasingly express interest in aggregating large channel blocks and using advanced technologies to increase system capacity and serve wide areas efficiently. Increasing numbers of SMR licensees have requested rule waivers to permit them to construct advanced, spectrally efficient systems that would increase system capacity and permit seamless end user "roaming" among many transmitter sites.[8]

---

[1] *See* RM-8029 (asking Commission to facilitate licensing of wide area SMRs), filed March 13, 1992 by NABER [hereinafter "NABER Petition"]; RM-8030 (asking Commission to modify the "40 mile rule," 47 C.F.R. § 90.627(b)), filed May 26, 1992 by A&B Electronics; RM-8117 (proposing a wide area licensing program), filed October 26, 1992 by AMTA [hereinafter "the AMTA Blueprint"].

[2] The SMR Service is governed by Subpart S of Part 90 of the Commission's Rules, 47 C.F.R. §§ 90.601-90.657.

[3] *See* First Report and Order and Second Notice of Inquiry, Docket No. 18262, 35 F.R. 8644 (June 4, 1970); Second Report and Order, Docket No. 18262, 46 FCC 2d 752 (1974), *modified on recon.*, Memorandum Opinion and Order, Docket No. 18262, 51 FCC 2d 945 (1975), *aff'd*, National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976). SMR spectrum is also allocated at 900 MHz, but regulatory initiatives for those channels are the subject of another proceeding. *See* First Report and Order and Further Notice of Proposed Rule Making, FCC No. 93-34, PR Docket No. 89-553, 8 FCC Rcd 1469 (1993) [hereinafter *900 MHz Phase II*].

[4] *See* Memorandum Opinion and Order, Docket No. 18262, *supra* note 3, paras. 6, 43, 67 (1975); Second Report and Order, PR Docket No. 79-191, 90 FCC 2d 1281 (1982), para. 12 (1982), *modified*, Memorandum Opinion and Order, 95 FCC 2d 477 (1983).

[5] *See* Second Report and Order, Docket No. 18262, 46 FCC 2d at 755.

[6] *See* Memorandum Opinion and Order, Docket No. 18262, *supra* note 3, para. 43. *See also* Second Report and Order, PR Docket No. 79-191, *supra* note 4, para. 149 (SMR system operators failed to show general need for wide area capability).

[7] For example, after completing its merger with Dispatch Communications, NexTel Communications, Inc. (formerly Fleet Call, Inc.) expects to serve markets with a combined population of 95 million people in areas approximately equivalent to 70 metropolitan statistical areas (MSAs). Similarly, the April 1993 consolidation of CenCall Inc. of Denver (CenCall) and SMR Network Inc. of Portland, Ore. will enable CenCall to cover an area including four of the top 30 MSAs. *Major Players Announce Mergers*, Open Channels, Jan-Feb 1993, at 12, 14.

[8] The first of these waivers were granted to Fleet Call, Inc. (Fleet Call), Mobile Radio New England (MRNE) and Advanced Radio Communication Services of Florida, Inc. (Advanced). *See* Fleet Call, Inc., 6 FCC Rcd 1533 (1991); Letter from Richard J. Shiben, Chief, Land Mobile and Microwave Division, Private Radio Bureau, to George Hertz, President, Advanced MobileComm of New England, Inc. (April 13, 1992); 1992 grant of applications assigned file numbers 553493-553499 and associated Request for Rule Waiver filed by Advanced Radio Communication Services of Florida, Inc. on July 15, 1991.

4. Our rules have generally proven flexible enough to accommodate existing licensees that seek to convert their analog systems to wide-area systems employing advanced technologies. For example, NexTel Communications, Inc. (NexTel) is now developing wide-area systems in six areas of the country, almost entirely within the scope of our rules. In enabling NexTel and subsequent applicants to implement these systems, we did, however, recognize that wide-area licensees might be unable to construct and begin to operate their innovative networks within the one year construction period set by our rules, and we therefore granted extended periods of time to implement the proposed systems.[9]

5. Although our present rules do not foreclose the growth of advanced and wide-area SMR systems, we believe that some rules might be modified to ease what the petitioners characterize as a large-scale industry transition to new system technologies and configurations. In addition, wide-area SMR applications that comply with our existing regulatory framework are often so voluminous and complex that they have reduced the efficiency of license processing. We have already proposed to permit licensees to locate transmitters less than 70 miles from co-channel stations, depending on the actual operational parameters of proposed and existing co-channel facilities, in recognition of increasing interest in advanced system design and widely dispersed system configurations.[10] We also have proposed to amend the rule requiring that SMR licensees construct trunked system facilities within one year of the initial license grant,[11] because such licensees are often unable to construct complex advanced networks and place them into operation before one year expires.[12] In the instant proceeding, we intend to examine how other rules may inadvertently deter development of modern systems. For example, our rule prohibiting applying for more than five 800 MHz SMR channels at a time[13] prevents implementation of multi-site, low-power networks where spectrum use is too low to satisfy aggregate loading requirements.[14]

6. The various petitioners have suggested new approaches to accommodating 800 MHz wide-area SMR systems. For example, AMTA asks us to establish a program to authorize blocks of channels to particular licensees to be used for operations within areas no smaller than MSAs and RSAs.[15] NABER, on the other hand, proposes that we amend Sections 90.631(g) and (h) of our Rules, 47 C.F.R. §§ 90.631(g),(h), to simplify existing procedures for 800 MHz SMR operators to create wide-area systems within geographic areas of their own choosing.[16] Finally, A&B proposes that we permit licensees to acquire stations within 40 miles of the licensee's existing station if both stations were fully loaded at the end of the initial five year license term.[17]

III. PROPOSAL

7. We have examined these petitions, the comments and replies filed in response to the petitions, and the various applications for waiver of our rules. Based on this record, we conclude that modifying our rules could promote use of advanced radio technologies, expansion of SMR system capacity and development of wide-area 800 MHz SMR services. We propose in this proceeding to establish an "Expanded Mobile Service Provider" (EMSP) licensing approach to assigning 800 MHz SMR spectrum for wide-area use throughout wide service areas. Pursuant to this proposed licensing method, we would:

- Grant a new type of 800 MHz SMR wide-area license that would permit channels to be aggregated for operation of wide-area systems throughout each of the 47 Rand-McNally Major Trading Areas (MTAs), or, in the alternative, each of the 487 Rand-McNally Basic Trading Areas (BTAs) and Puerto Rico;
- Initially restrict eligibility for EMSP licenses to those entities who are licensees of 800 MHz SMR systems within the BTA/MTA on or before May 13, 1993, and seek to reuse throughout that area the SMR channels operating on stations that they have constructed and placed in operation as of the date that they apply for the EMSP license;
- Dispose of applications requesting licensing on the same channels within a BTA/MTA:

  1. a. by providing applicants within the area with a 60-day opportunity to resolve the conflict, and if they are unable to do so,

     b. by rank-ordering all applications within the area by lottery and granting applications accordingly; or

  2. through competitive bidding, if we are authorized to use such procedures to select among mutually exclusive applicants;

- Grant, on a first-come, first-served basis, EMSP licenses for a total not to exceed 42 channels, to any entity except those with an EMSP license for 42 or more unconstructed EMSP channels within the particular BTA/MTA;

---

[9] *See* Fleet Call, Inc., 6 FCC Rcd at 1535-36; Memorandum Opinion and Order, Mobile Radio New England Request for Rule Waiver, FCC No. 92-550, 8 FCC Rcd 349 (1993), para. 8.

[10] *See* Notice of Proposed Rule Making, PR Docket No. 93-60, 8 FCC Rcd 2454 (1993).

[11] 47 C.F.R. § 90.631(e), (f).

[12] *See* Notice of Proposed Rule Making, PR Docket No. 92-210, 7 FCC Rcd 6587 (1992); Report and Order, PR Docket No. 92-210, adopted May 13, 1993, _____ FCC Rcd _____ (1993).

[13] *See* 47 C.F.R. § 90.621(a)(1)(iv).

[14] *See* letter of December 23, 1992 from Ralph A. Haller, Chief, Private Radio Bureau, to Mr. David E. Weisman (Weisman letter).

[15] *See* AMTA Blueprint at 5.

[16] *See* NABER Petition at 4-5. NABER also proposes that we permit Business Radio Service licensees to operate "satellite" stations on a primary basis in wide-area system configurations. Presumably such wide-area Business Radio Service systems would continue to be foreclosed from reselling excess system capacity on a for-profit basis, because our Rules prohibit for-profit resale above 800 MHz by non-SMR licensees.

[17] *See* RM-8030, filed May 26, 1992 by A&B Electronics, at 9-15.

- Permit EMSP licensees to reuse any SMR Category channels covered by the EMSP license throughout the BTA/MTA without regard to current restrictions on applying for more than five channels at a time or establishing minimum loading;
- Require EMSP licensees to certify that they will protect existing co-channel licensees and previously filed co-channel applications from harmful interference;
- Require an EMSP licensee to construct and operate a system that covers at least 80 percent of the population or 80 percent of the geographic area in its BTA/MTA;
- Require EMSP licensees to construct and begin operating their systems within five years of the date the license is granted;
- Permit an EMSP licensee to modify its system license by obtaining conditional authority to operate its individual base stations within the BTA/MTA upon completing a "self-coordination" procedure;
- Require an EMSP licensee that has not constructed and placed in operation sufficient 800 MHz SMR channels to meet our EMSP construction standards prior to applying for an EMSP license to post a performance bond or place funds in escrow to be withdrawn as needed for construction of the remaining facilities as a condition of receiving five years to implement its wide-area system;
- Prohibit EMSP licensees from assigning or transferring their licenses or applying for additional wide-area channels until they have satisfied our requirements for constructing and operating the EMSP channels, but allow them to lease capacity on their systems in the interim;
- Cancel the EMSP license for failure to comply with any of the proposed conditions of the license. Upon cancellation, the EMSP licensee would retain an individual SMR license for each base station within the BTA/MTA that has been constructed and placed in operation.

In the following section, we will provide further discussion of these proposals, requesting comment on the specific elements of the proposal and on a variety of other regulatory issues that will affect the future development of the 800 MHz SMR industry.

IV. DISCUSSION

8. Any rule making addressing the issues raised by this *Notice* must satisfy certain objectives. First, we must reduce the administrative burdens currently associated with filing and processing requests to implement 800 MHz wide-area SMR systems. Second, we must develop flexible policies that will permit 800 MHz SMR system operators in all areas of the country to develop wide-area systems while continuing to allow entities that do not wish to implement such systems to acquire spectrum and remain viable. Third, we must ensure that licensees of such wide-area systems make productive use of the spectrum by constructing and implementing their systems promptly. In addition, we must encourage more efficient use of spectrum, particularly in congested areas, and accommodate technologically advanced systems supporting enhanced services such as seamless wide-area roaming and high speed data transmission. Finally, we intend to preserve those factors that contribute to the current success of 800 MHz SMR operations.

A. Future Development of the 800 MHz SMR Industry

9. As we have indicated, a key objective of this proceeding is to ensure that the industry continues its currently successful direction. We accept AMTA's basic premise that a large segment of the 800 MHz SMR industry is evolving into a number of compatible, wide-area SMR networks employing advanced technologies.[18] SMR system operators are increasingly joining licensee consortiums to construct and link new systems using compatible, highly efficient system technologies.[19] These new networks will support not only interconnection to the public switched telephone network but also high speed data transmissions and end user "roaming" between transmitter sites. Our goal is to ease the current transition to wide-area networks for both small and large licensees, and to efficiently license systems offering advanced technologies now and in the future. We also intend to use this proceeding to identify and help satisfy the future needs of the rapidly evolving 800 MHz SMR marketplace.

10. Stand-alone (non-wide-area) 800 MHz SMR systems currently play a significant role in the SMR industry. The AMTA Blueprint and the recent proliferation of applications to implement wide-area systems, however, raise the issue of whether the stand-alone SMR operator will remain a permanent part of the SMR market. We invite discussion of the future role of stand-alone entrepreneurs. Will stand-alone systems continue to fulfill needs that would not be met by wide-area networks? Could any such needs be met by systems below 800 MHz? Should we preserve some 800 MHz spectrum for stand-alone systems? If so, how much spectrum should be reserved, and what mechanisms could we incorporate into a regulatory scheme to set aside spectrum without resulting inefficiencies?

B. Defining the Market

11. To date, applicants for waivers to create wide-area SMR systems have chosen the areas that they seek to serve, the boundaries of which are inferred from the composite service areas of their existing high-powered SMR base stations.[20] Defining a proposed wide-area system in this way is a natural product of our existing rules, which were not originally drafted in contemplation of such systems. Allowing the licensee to define its own area of operation without regard to any artificial boundaries and to freely incorporate any or all of its existing facilities may be advantageous. Since our current rules encompass licensee-defined wide-area operations, this approach would also be least disruptive to the current 800 MHz SMR market. Unfortunately,

---

[18] *See* AMTA Blueprint at 1-4 (discussing wide-area system initiatives).

[19] *See, e.g.*, Seth Malgieri, *SMR Groups Band to Create Digital Wireless Network*, RCR, March 22, 1993, at 1; *Roaming Consortium Adds New Members*, Open Channels, March 1993, at 13.

[20] NABER supports continuing this concept. Comments of NABER, regarding AMTA Blueprint, at 9.

there are also numerous difficulties associated with licensees defining their own markets, and these will become more apparent as we receive more applications for such systems.

12. Licensee-defined markets have apparently proven effective thus far because all SMR wide-area systems have been established through conversion of existing facilities that meet certain operational requirements.[21] Continuing to license 800 MHz SMR wide-area systems through reliance upon licensee-defined service areas, however, could eventually complicate processing and implementation of these systems. These complications would increase if we acted in this proceeding to relax the operational requirements that presently limit the size and scope of SMR wide-area systems. For example, if we enabled applicants to acquire more than five SMR Category channels at a time,[22] a licensee-defined service area approach would make it difficult to define the limits of a reasonable service area for an applicant that wishes to construct a wide-area system but has few or no existing sites. The same difficulty arises if we attempt to impose reasonable limitations upon the extent to which existing licensees may expand their systems. Applications for licensee-defined service areas are also burdensome to process because of likely overlap of service contours, making it difficult to define operating areas and determine actual channel availability. Commenters that favor continuing licensee-defined service areas should address the specifics of how licensees should define their systems, what, if any, limits should be placed on the extent of the geographic area specified, and how an existing licensee would be able to extend its coverage area. In discussing this issue, commenters should consider the feasibility of licensee-defined service areas if accompanied by a relaxation in certain of our SMR operational requirements to promote expansion of wide-area offerings. *See, e.g.,* 47 C.F.R. §§ 90.621(a)(1)(iv) and 90.627(b).

13. In the alternative, we could establish service areas for new wide-area systems, consistent with the AMTA Blueprint.[23] This method has been proposed for regional 900 MHz SMR licenses[24] and regional personal communications systems.[25] Commission-defined markets could greatly expedite the licensing process for wide-area systems by simplifying determinations of which license applications are mutually exclusive. In addition, defined service areas provide licensees with greater certainty regarding the environment for planning and implementing wide-area systems. One drawback of Commission-defined markets, however, is the potential that markets will be defined in a way that is not consistent with the licensee's perception of its customer base.

14. There are a number of existing options available for defining markets, such as the 734 Metropolitan Statistical Areas and Rural Service Areas (MSA/RSA), 487 "Basic Trading Areas" (BTAs), 47 "Major Trading Areas" (MTAs), the 7 Regional Bell Operating Company areas, or 194 telephone Local Access and Transport Areas (LATAs),[26] that divide the country into regions of various sizes taking into account actual business markets. AMTA proposed that the Commission define markets by reference to MSAs and RSAs, but indicated that it remains open to other paradigms.[27]

15. We believe that licensing 800 MHz wide-area systems based on either a BTA or MTA approach would better serve the public interest. The 47 MTAs define regions that are large enough to permit systems to re-use spectrum efficiently, to provide the economies of scale necessary to allow a licensee to provide complete state-of-the-art service, and to provide licensees the flexibility and coverage required to fulfill their customers' desires for complete coverage throughout their particular business areas. MTAs may, however, exceed the anticipated geographic boundaries of these evolving SMR service offerings. In addition, MTAs may not provide sufficient opportunity for small businesses and new entrepreneurs to take advantage of the licensing opportunities we propose to create. Accordingly, we also ask commenters to consider the merits of licensing 800 MHz wide-area systems based on the 487 Basic Trading Areas (BTAs). Like MTAs, BTAs represent economically-related geographic areas. BTAs are small enough, however, to perhaps better reflect the scope of a licensee's intended market. We will refer to licensees authorized to apply for use of 800 MHz SMR channels throughout the BTA/MTA regions as "expanded mobile service providers" (EMSPs). We request comment on our proposal. Specifically, we request comments on the advantages of Commission-defined versus licensee-defined service areas and whether the adoption of BTA service areas, MTA service areas, or some other alternative proposal would be the best approach for 800 MHz licensing. We also ask commenters to consider the impact on our administrative efficiency of awarding licenses in 487 BTAs as opposed to 47 MTAs. Given the current proliferation of filings for 800 MHz wide-area SMR systems, we also ask for comment on whether it is necessary or even desirable to amend our existing rules. Can wide-area development be successfully accommodated by preserving the status quo or does future growth of the industry call for some revision of our rules?

Establishing the EMSP License

16. To date, all applicants for wide-area 800 MHz SMR systems have applied for waiver of our one-year construction requirement. In order to implement these wide-area systems, these applicants must also demonstrate sufficient "aggregate loading"[28] to satisfy the 40 mile rule and the limit on submitting an application for more than five channels at one time. These rules pose different obstacles to applicants for wide-area systems, depending on whether they are existing licensees or new to the market, the extent to which their systems are loaded, and where the systems are located.

---

[21] *See* Weisman letter, *supra* note 14.

[22] *See* 90.621(a)(1)(iv).

[23] AMTA supports the creation of Commission-defined markets. *See* AMTA Blueprint at 5.

[24] *See 900 MHz Phase II, supra* note 3, para. 16.

[25] Notice of Proposed Rule Making and Tentative Decision, General Docket No. 90-314, 7 FCC Rcd 5676, 5699-5701 (1992).

[26] *See* U.S. v. Western Electric, 569 F. Supp. 1057 (D.D.C. 1983), *subsequent history omitted,* for the boundaries of the RBOC regions and the LATAs. *See also* Rand McNally 1992 Commercial Atlas & Marketing Guide, 123rd Edition, pp. 36-39 (boundaries of the Major Trading Areas and Basic Trading Areas); 47 C.F.R. Part 22 (describing MSAs and RSAs); Notice of Proposed Rule Making and Tentative Decision, General Docket No. 90-314, 7 FCC Rcd 5676, 5699-5701 (1992); *900 MHz Phase II, supra* note 3, para. 16.

[27] *See* AMTA Blueprint at 5 & n.7.

[28] *See* Weisman letter, *supra* note 14.

17. We are proposing procedures that would facilitate licensing for licensees of loaded and unloaded systems, as well as newcomers seeking wide-area system authorizations. Our proposals would give existing licensees the first opportunity to reuse their channels with constructed and operating stations throughout their BTAs or MTAs, but we would also provide 800 MHz wide-area licensing opportunities for new applicants and those interested in bringing wide-area service to rural areas. All operations under an EMSP license would be exempted from the 40 mile rule, the five channel limit, and certain restrictions on station location and construction time. We solicit comment on the proposed EMSP license and the licensing procedures detailed below.

Benefits of EMSP License

18. An EMSP licensee would be able to construct its channels anywhere it chooses within its BTA/MTA, provided that it protects existing co-channel systems. Under our current rules, if an SMR licensee wishes to construct wide-area facilities, it must obtain a license for each proposed or modified base station site.[29] Petitioners for wide-area systems have requested greater flexibility to add or modify base stations without the need for individual station authorization from the Commission.[30] We have proposed such an approach to licensing nationwide and regional SMR systems in the 900 MHz band,[31] and we believe that a similar approach is feasible and advisable to promote efficient development of wide-area systems in 800 MHz spectrum. We propose to permit both existing wide-area 800 MHz SMR system licensees[32] and future EMSP licensees to add authorized channels on existing or new base stations within the BTA/MTA by extending availability of conditional licensing. *See generally* 47 C.F.R. § 90.159. We also propose to streamline the application process by requiring EMSP licensees to submit their own frequency coordination analyses for each base station facility and by implementing electronic application filing procedures.[33]

40 mile rule; 5-channel licensing limit

19. Pursuant to our current policies, licensees may convert "aggregately loaded"[34] SMR systems to wide-area networks[35] without obtaining waivers of 47 C.F.R. §§ 90.627(b) ("40 mile rule") or 90.621(a)(1)(iv) (limiting licensing of trunked channels to five channels at a time).[36] The 40 mile rule and the five channel limit were originally designed to prevent licensees from warehousing spectrum.[37] We propose to prevent this from occurring under the EMSP licensing plan by requiring that EMSPs meet strict construction and implementation requirements.[38] Additionally, after the initial phase of EMSP licensing,[39] we propose that an applicant be granted an EMSP license for a total number of channels that will not exceed 42 unconstructed channels.[40] Under our proposed rules, therefore, the operations of EMSPs would not be subject to the five channel limit and the 40 mile rule. We request that commenters express their positions on our proposals.

C. Licensing Mechanism

Initial Filing Window

20. AMTA proposes that we establish a one-time filing window for existing 800 MHz SMR licensees to apply for wide-area system licenses, with first-come, first-served wide-area licensing thereafter. Pursuant to the AMTA Blueprint, the Commission would delineate geographic areas no smaller than MSAs and RSAs and license wide-area operations throughout those areas. In areas with more than 42 unlicensed channels, AMTA proposes that we designate and license 42-channel blocks for operation throughout a wide-area by new or existing individual licensees or coalitions of licensees. AMTA also proposes that we randomly select the licensees of these channel blocks by conducting lotteries. AMTA proposes filing fees of $200.00 per channel, strict construction requirements, and restrictions on license assignment and transfer.

21. In areas with fewer than 42 unlicensed channels, AMTA proposes that we establish one-time 30-day filing windows and accept applications from licensees proposing to reuse throughout an MSA or RSA the 800 MHz SMR channels that the licensees already operate on constructed sites within the area.[41] In order to encourage use of advanced technologies, AMTA suggests that we require that applicants propose to implement their wide-area systems using technologies capable of providing twice the capacity of state-of-the-art analog systems. To promote orderly and efficient consolidation of existing systems' authorized channels for wide-area operation, AMTA proposes that we accept applications from groups of eligibles as well as individual licensees.[42] AMTA proposes that we first grant the application of the entity operating the most constructed discrete frequencies, then the request of the applicant operating the second-largest group of constructed frequencies, and so forth.[43] According to AMTA, this licensing mechanism would avoid the procedural problems that arise when several applicants request the same frequencies by deleting

---

29 *See* Fleet Call, Inc., 6 FCC Rcd at 1535.

30 Fleet Call requested such an approach. The Commission, however, determined that Fleet Call could fulfill its goals without the extensive relief requested. *See* Fleet Call, Inc., 6 FCC Rcd at 1534-1535.

31 *See 900 MHz Phase II, supra* note 3, para 43.

32 The "existing wide-area . . . licensees" are those licensees that have received or will obtain waivers of our rules to develop wide-area systems over a licensee-defined area.

33 *See infra* para. 34.

34 *See, e.g.*, Fleet Call, Inc., 6 FCC Rcd at 1535.

35 *See supra* note 8 (discussing wide-area system requests that we have granted). *See also* Section 90.621(b) of our Rules (normal spacing requirements of co-channel SMR systems). 47 C.F.R. § 90.621(b).

36 *See* 47 C.F.R. §§ 90.627(b), 90.621(a)(1)(iv).

37 *See, e.g.*, Memorandum Opinion and Order, Docket No. 18262, 51 FCC 2d at 956-57 para. 38; Memorandum Opinion and Order, PR Docket No. 79-191, 95 FCC 2d 477, 483 para. 10 (1983).

38 *See infra* Section D (discussing these requirements).

39 *See infra* paras. 24 - 28.

40 We have chosen 42 channels because, considering petitions and comments we have received, we believe that this is the smallest block of channels necessary for a licensee to construct an economically viable wide area system that is able to take full advantage of the spectrum efficiency benefits of vigorous channel reuse. *See* AMTA Blueprint at 10.

41 AMTA Blueprint at 6. AMTA would have us require wide-area licensees to protect existing co-channel licensees, nonetheless, by satisfying a 40/22 dBu standard for co-channel distance separation. *Id.* at 7.

42 *Id.* at 6-7.

43 *Id.* at 7.

requests in pending applications for channels already authorized to a higher-ranked applicant. AMTA states that this approach would facilitate rapid and efficient licensing and enable expeditious development of wide-area 800 MHz SMR service.[44]

22. NABER proposes that we continue to accept wide-area license applications on a first-come, first-served basis. NABER suggests minor amendments to our rules that would increase the flexibility of licensees seeking to define and expand wide-area systems. Under NABER's proposal, we would amend Section 90.631(g) and (h) of our rules to permit a wide-area SMR licensee to reuse its authorized frequencies at other sites operated by that licensee. Although NABER would have us authorize wide-area systems even to licensees without aggregate loading, a licensee could not reuse its channels at an additional site within 40 miles of an existing, unloaded station operated by that licensee. NABER's Petition does not elaborate a way for applicants with no existing SMR licenses to obtain wide-area licenses, nor does it suggest procedures to resolve potentially numerous requests for the same channels in the same area.

23. We agree with NABER's observation that, although licensees are already constructing wide-area systems, existing licensing mechanisms have caused processing bottlenecks, substantially delaying service to the public.[45] Nevertheless, we propose to solve the delays with an orderly mechanism that would allow us to license new wide-area systems and facilitate consolidation of existing systems. We believe that our approach will alleviate uncertainty among small businesses, provide opportunities for new businesses to establish wide-area systems, and promote state-of-the-art service to areas outside major markets. We intend that our proposed rules be responsive to concerns that AMTA has identified, while building in the operational flexibility that NABER states is necessary.

24. We therefore propose initially to restrict EMSP license eligibility to applicants that are licensed on one or more SMR Category channels in the relevant BTA/MTA as of May 13, 1993. These applicants will be permitted to apply for an EMSP license to reuse throughout the BTA/MTA all such channels that operate on constructed base stations as of the date the EMSP application is filed. We believe that the public would benefit from a more viable and expeditiously provided EMSP service by permitting existing licensees first to convert their existing systems to wide-area operations before newcomers are authorized to operate on the existing licensee's channels in the relevant BTA/MTA. Numerous SMR systems already occupy all 800 MHz SMR channels in many parts of the country. This extensive infrastructure, which is already in place, will as a practical matter be the foundation for any quality EMSP offering. Furthermore, if applicants without constructed systems were eligible for initial MTA licensing, they would be required nonetheless to protect existing co-channel systems, and their MTA systems would therefore surround and provide no wide-area service to large central regions. Existing licensees, in contrast, could increase overall spectrum capacity by aggregating and reusing their authorized frequencies at their existing sites. We therefore believe that this initial license eligibility restriction would enable non-disruptive and efficient provision of service to the public, and thus *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), does not preclude us from setting these standards.[46] We solicit comment on the benefits and/or detriments of initially restricting eligibility for EMSP licenses to applicants seeking to reuse throughout a BTA/MTA the channels that they have already constructed and placed in operation. In addition, we ask commenters to consider the possibility that Congress may grant the Commission auction authority, or design competitive bidding procedures for licensing channels. If that authority is granted, and exercised to authorize wide-area SMR systems at 800 MHz, would different eligibility criteria be preferable?

25. During this first phase of EMSP licensing, we propose to allow applicants to reuse throughout the BTA/MTA only those 800 MHz SMR Category channels that are being operated on constructed base stations within the BTA/MTA on the date the application for an EMSP license is filed. Loading levels would not be relevant to eligibility for this initial 30-day filing window. Our proposal is consistent with AMTA's Blueprint, which emphasizes the need for a well-defined, orderly process to facilitate consolidation and spectrally efficient reconfiguration of existing 800 MHz SMR systems.[47] A licensee operating several noncontiguous systems in a BTA/MTA could apply for authorization to aggregate any number of its authorized SMR Category channels for reuse within the BTA/MTA. Nevertheless, we would require EMSP license applicants to certify that each base station constructed pursuant to their EMSP licenses would comply with the co-channel protection provisions of 47 C.F.R. § 90.621(b). Note that an authorized EMSP could continue to employ existing non-SMR Category

---

[44] *Id.* at 8.

[45] *See* NABER Petition at 3.

[46] *See* United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) (hearing requirement in 47 U.S.C. § 309 does not limit the Commission's power to establish license eligibility criteria). The Commission exercised this authority in, for example, An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, 86 FCC 2d 469, 483 (1981) (restricting license eligibility for a block of cellular radio frequencies to wireline telephone carriers for a number of years), *modified*, 89 FCC 2d 48, 69-77 (1982) (further limiting wireline set aside period), *further modified in* Amendment of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings, 98 FCC 2d 175, 194-98 (1984) (reaffirming eligibility criteria, but redefining set aside periods for each market), *modified on other grounds*, 101 FCC 2d 577 (1985); Second Report and Order/Further Notice of Proposed Rule Making, Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, 7 FCC Rcd 3340, 3342-43 (1992) (limiting initial eligibility for Advanced Television frequencies to existing broadcasters), *recon.*, Memorandum Opinion and Order/Third Report and Order/Third Further Notice of Proposed Rule Making, MM Docket No. 87-268, FCC 92-438, released October 16, 1992, at paras. 3, 6, 8 n.9 (reaffirming eligibility restriction); Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, GN Docket No. 90-217, 6 FCC Rcd 3488 (1991), *recon. granted in part*, 7 FCC Rcd 1808 (1992) (establishing a dispositive "pioneer's preference" for developers of new or innovative communications services), *further recon. denied*, Memorandum Opinion and Order, FCC No. 93-116, 58 Fed. Reg. 14328 (1993).

[47] *See* AMTA Blueprint at 5-6.

channels at existing sites within its BTA/MTA, but such channels could not be freely reused throughout that area as are SMR Category channels.[48]

26. We propose to allow existing licensees to join a consortium of other licensees within a BTA/MTA to file an EMSP license application. An EMSP license granted to a coalition applicant would permit the coalition members to aggregate and reuse the constructed and operational channels of all coalition members throughout the BTA/MTA. We emphasize, however, that under our proposal each licensee could incorporate its constructed and operating channels into only one EMSP license application. Specifically, an 800 MHz SMR Category channel operating on a station that has been constructed and placed in operation within the BTA/MTA could be included in only one EMSP application. We would, however, permit an SMR licensee operating a number of channels with constructed and operational stations to split its channels among two or more EMSP applications, provided again that each of the licensee's discrete channels is incorporated into only one EMSP license application.[49] We tentatively decide to preclude managers of constructed and operating systems from applying for an EMSP license during this initial filing period, except as part of a consortium with full agreement of the member licensees, but we request comment on whether persons or entities with exclusive agreements to manage constructed and operating systems should be eligible at this point for EMSP licenses.

27. After we close the initial filing window in each BTA/MTA, we propose to grant all qualified applications for EMSP licenses in that area that are not mutually exclusive with other applications. An application would be considered "mutually exclusive" with other applications if the application contained any of the same channels that the other applicants requested within the BTA/MTA. We would provide mutually exclusive applicants with an opportunity to negotiate with one another for sixty days after their applications are designated for lottery to resolve any conflicting requests for channels and amend or withdraw their applications to eliminate any mutual exclusivity. We would not permit any consideration to pass among negotiating entities in exchange for agreement to withdraw or amend their pending EMSP applications, and we would not award cumulative chances in a lottery to those entering into post-filing settlements.[50] We ask commenters to address the adequacy of these safeguards and discuss other methods of regulating the process to avoid abuses and ensure that all EMSP license applicants harbor bona fide intentions to construct and operate a wide-area 800 MHz SMR system.

28. If mutually exclusive applicants fail to resolve conflicts through full market settlements, we propose to rank order randomly all mutually exclusive applications within the BTA/MTA and to grant EMSP licenses in accordance with that rank order. We would require each applicant to indicate, in an attachment to its EMSP license application, the minimum number of EMSP channels it would accept. Thus, after we grant a request to license channels that are also requested by a lower-ranked applicant, we would examine the latter application to determine whether the applicant agreed to accept the number of its requested EMSP channels that remain available for licensing after all previous licenses have been granted. If so, then the applicant would receive, through partial grant of its application, an EMSP license for those remaining channels. Otherwise, we would dismiss the application.

29. AMTA proposes that we select among mutually exclusive applicants by granting wide-area system licenses to the applicants with the most discrete channels in a market, in descending order of preference.[51] We tentatively conclude, however, that granting a dispositive preference to those applying for the largest number of discrete channels in a market would not serve the public interest. We believe that, in general, applicants with a broad range of discrete channels may bring wide-area service to the public as promptly and surely as applicants with the most channels. Indeed, a licensee that arranges low-powered transmitters with low antenna heights in a closely spaced configuration can produce greater system capacity than traditional systems often maintain using two to six times as many channels. We nevertheless request comment on this issue. We also invite commenters to discuss other alternatives to our lottery proposal that are both feasible and legally supportable. In particular, we invite commenters to consider the possibility that Congress may grant the Commission authority to design competitive bidding procedures for licensing channels. Should that authority, if granted, be exercised to authorize grants of EMSP licenses to existing SMR licensees seeking to expand into BTAs/MTAs? Should grants by competitive bidding be limited to newly acquired channels? We request comment on what specific rule changes would be necessary and advisable to implement competitive bidding procedures for EMSP system licenses?

Subsequent Applications

30. After this initial round of licensing, we propose to accept applications for all SMR Category channels not assigned to EMSP licensees in the initial round on a first-come, first-served basis within each BTA/MTA. We would accept applications from all entities, except those EMSP licensees that are licensed for 42 or more EMSP channels and that have not met the 80 percent coverage requirements of proposed Section 90.677(d), discussed below in Section D. We would permit each applicant to apply for wide-area use of not more than 42 channels. The channels that applicants seek to use must be available for licensing at some location within the BTA/MTA. All EMSP license applicants must certify that they will protect existing licensees and previously-filed co-channel applications,[52] con-

[48] *See* discussion of EMSP use of non-SMR Category channels, *infra* para. 32.

[49] We propose to appropriate AMTA's suggestion that we require applicants to submit, with each EMSP license application, information including a list of participating licensed discrete channels, the licensee names, transmitter site coordinates and call signs of each channel at each base station site. *See* AMTA Blueprint at 6. We propose to require applicants to file their license applications and supplements electronically, pursuant to a computer format that would be set forth in a Public Notice, contingent on our ability to accept such information in an electronic format. This electronic filing process would simplify data base management and expedite application processing. *See Order*, FCC No. 93-174, 58 Fed. Reg. 21405 (1993) (modifying rules so that we may accept electronically "signed" filings).

[50] While the licensing mechanism we propose contemplates formation of pre-filing settlement groups, we will not award cumulative chances to the surviving application.

[51] *See* AMTA Blueprint at 7-8.

[52] In light of these proposed changes to our regulatory scheme

sistent with 47 C.F.R. § 90.621(b). In addition, we would again require applicants to indicate the minimum number of EMSP channels that they would accept, and would limit an applicant to including a given constructed and operating channel in no more than one EMSP license application. Furthermore, to reduce the potential for manipulation of the selection process, we would preclude any EMSP applicants with no licenses for 800 MHz SMR Category channels in the BTA/MTA from participating in more than one EMSP license application. Specifically, we would not permit any person or entity with a direct or indirect interest[53] in one EMSP applicant to invest directly or passively, hold or exercise any control over, or otherwise participate in another applicant for an EMSP license in the same BTA/MTA.[54] We would consider these subsequent applications to be mutually exclusive only if they were filed on the same day and requested use of any of the same channels within the same BTA/MTA. Once again, we would provide a 60-day opportunity for mutually exclusive applicants to negotiate among themselves, and, if that manner of resolution failed, we would randomly select and grant one application at a time, following the procedures described above in paragraph 28.

31. We ordinarily assign the same call sign to all channels at a given base station site, rather than assigning a separate call sign to each channel in a designated area. In this proceeding, however, we propose to grant a system license for an indeterminate number of base station sites, because we are authorizing flexible system configuration. Assigning an individual call sign to each EMSP license would be consistent with anticipated operations and would provide us with sufficient information to track spectrum use. Addition of base stations to the EMSP license would thus be treated as a license modification. We therefore propose to assign an individual call sign to each EMSP license, covering all stations in the BTA/MTA.[55] We request comment on this call sign proposal. Because we are proposing to assign a single call sign to every EMSP license, the filing fee for each EMSP application would be $35.[56] We request that commenters discuss this proposal.

Expanding EMSP Systems

32. Several comments on the Petitions before us raise questions regarding wide-area system reuse of channels that are not allocated to the SMR Category.[57] We propose to permit EMSPs that have incorporated non-SMR Category channels into their existing systems to continue to use those channels at base station sites that were already authorized for such operations. Out-of-category channels could not, however, be part of an EMSP license, either initially or through modification of the EMSP license. We propose that traditional SMR systems, however, could continue to expand in accordance with our current rules and policies.[58] We ask for comment, nevertheless, on whether intercategory sharing opportunities for traditional SMRs should be limited to General Category frequencies because depletion of SMR Category frequencies by EMSP licensees may cause unacceptable increases in demand for out-of-category assignments. We also ask if we should permit General Category channels to be incorporated into EMSP licenses since SMRs are also eligible to operate on frequencies in the General Category.

D. Implementing EMSP Systems

1. Modifying an EMSP License

33. Under existing rules, applicants for SMR Category channels specify particular coordinates, and SMR base stations are individually licensed in accordance with fixed co-channel mileage separations on a first-come, first-served basis. *See* 47 C.F.R. § 90.621(b). Our proposal, however, authorizes p: wide-area licensees to use their channels anywhere within a BTA/MTA. This is similar to the proposal to allow 900 MHz SMR licensees to develop regional SMR systems.[59] In that proceeding we proposed to allow such licensees great flexibility in constructing and modifying stations in most instances, without prior authorization from the Commission.[60] Because there are more licensees in the 800 MHz band than in the 900 MHz band, however, there is a much greater risk of co-channel interference, and it is unlikely that we would be able to offer 800 MHz EMSPs the same degree of flexibility we proposed for 900 MHz regional licensees. We do believe, however, that 800 MHz EMSPs require more flexibility to construct and modify facilities than they currently have under our Rules.

34. EMSP licensees will be required to file an application to modify their licenses whenever an individual facility is added or modified. Currently the Commission performs all coordination for SMR applications requesting SMR Category channels. We anticipate, however, that an

---

for 800 MHz SMR systems, we are also proposing to discontinue waiting lists; therefore, EMSP licensees would not be required to protect waiting list applications, which would be returned without further action. *See infra* para. 34.

[53] Such an "interest" would include, but would not be limited to, the interests of stockholders, partners, owners, trustees, beneficiaries and directors. We request commenters to address whether we should restrict a person or entity with an exclusive agreement to manage a proposed EMSP system from involvement with another applicant.

[54] We propose, however, to permit these persons or entities to hold a *de minimus* interest in a publicly-held entity. *Cf.* Report and Order, PR Docket No. 89-552, 6 FCC Rcd at 2365 & n.128.

[55] We would, however, later permit EMSP licensees to request conditional permits to operate at particular base station sites.

[56] Applicants who receive EMSP licenses would be required to submit additional $35 fees later, when they file for conditional licensing of EMSP channels at new base station facilities, because those new authorizations would require us to modify their EMSP licenses.

[57] *See, e.g.*, comments of Utilities Telecommunications Council regarding the NABER Petition, at 5-7; reply comments of Industrial Telecommunications Association, Inc., regarding the AMTA Blueprint, at 7.

[58] An EMSP licensee operating a traditional SMR system in the same geographic area as its EMSP system base stations may not attribute the EMSP system mobiles to the mobile counts for the traditional SMR system. We will closely scrutinize requests of SMR licensees for additional channels to determine whether mobiles operating on a commonly owned EMSP system are being used to inflate SMR mobile counts. It would be appropriate for frequency coordinators processing intercategory sharing requests, pursuant to §§ 90.621(g)(2) and 90.621(g)(3), to also seek confirmation that the applicant's mobile count does not include mobiles operating on a proximate, commonly-owned EMSP system.

[59] *See 900 MHz Phase II, supra* note 3, para. 17.

[60] *See id.*, para. 44.

extremely large number of applications will be filed to license the individual stations that comprise an EMSP system and that it may not be possible for the Commission to coordinate all of these applications in a timely manner. To avoid overwhelming the Commission's limited resources, we propose to require electronic filing of these applications for license modification.[61] We also propose that EMSPs "self-coordinate" their applications. Under this policy of self-coordination, an EMSP will have to submit a list of all co-channel stations and previously filed co-channel applications in the area, including call signs and coordinates, and, if the stations do not meet the co-channel spacing requirements of Section 90.621(b), the power and antenna heights of the stations considered. Applications filed by EMSP license applicants should also clearly indicate how the proposed facility provides protection to all co-channel stations and previously filed co-channel applications in the area. This will greatly ease the burden on the Commission's resources and, because it is likely that an EMSP license applicant will perform these studies regardless of who coordinates the application, we do not believe that it will impose a substantial burden on EMSPs.[62] We request comment on this proposal. In addition, we believe that as EMSP licensing is implemented, waiting lists will no longer be necessary in the licensing of 800 MHz SMR systems. We therefore propose to eliminate waiting lists for 800 MHz SMR applications and return all applications that are pending on waiting lists.[63] We request comment on this proposal.

2. Co-channel Interference

35. There are two aspects to co-channel interference and the degree of flexibility a licensee should be given to add or modify base stations. The first consideration is protection of existing co-channel facilities. We anticipate that many existing co-channel facilities will not become part of an EMSP license. EMSPs will be required to protect such facilities.[64] We propose, however, that EMSPs be able to obtain conditional licenses to operate new or modified stations using their authorized wide-area channels provided the new or modified stations comply with the co-channel spacing requirements of Section 90.621(b) of our rules, 47 C.F.R. § 90.621(b).[65] In such situations the EMSP will be able to operate a new or modified facility for 180 days under a temporary permit evidenced by a temporary license certificate (FCC Form 572) after submitting a formal application for station license. Licensees will not, however, be permitted to operate under conditional authority in certain instances where greater regulatory oversight is generally required.[66] In such cases the licensee will have to submit an application and receive authority from the Commission *prior* to operation of the facility.

36. The other consideration is co-channel interference between adjacent EMSPs. To limit co-channel interference between adjacent regions we propose that the signal strength at the boundary of a licensee's region not exceed 22 dBu.[67] If we adopt this standard, the existing stations of an EMSP that are in operation when the wide-area application is filed and that result in a signal strength in excess of 22 dBu at the BTA/MTA boundary will not be required to reduce power. The co-channel wide-area operator in the adjacent BTA/MTA will not, however, be required to protect such an existing facility in accordance with Section 90.621(b). Rather, the licensee in the adjacent BTA/MTA would only be required to meet the 22 dBu field strength limit at the common border. We also propose, however, that an EMSP be able to exceed the 22 dBu field strength upon the written consent of its co-channel neighbor. We request comment on this proposal in general, and especially regarding whether the 22 dBu signal strength at the boundary is sufficient to allow a licensee to serve the entire BTA/MTA. We also request comment on any alternative approaches to guarding against co-channel interference. One alternative may be to have no co-channel interference standards between adjacent EMSPs. In this case the regional licensees would bear all responsibility for coordinating with their co-channel neighbors and resolving any co-channel interference problems. Another alternative would be to license the individual stations on a first-come/first-served basis and require the adjacent co-channel wide-area licensees to protect their neighbors' stations in accordance with the requirements of Section 90.621(b). We also ask for comment on this proposal.

---

[61] We would issue a Public Notice setting forth a computer format for these electronic filings. *See Order,* FCC No. 93-174, 58 Fed. Reg. 21405 (1993) (modifying rules so that we may accept electronically "signed" filings).

[62] Our proposed rules also require this supporting data to be electronically filed in accordance with a computer format that would be specified in a Public Notice.

[63] *See* 47 C.F.R. § 90.611(d). This proceeding contemplates a change in our licensing procedures so substantial as to render the waiting list concept of limited use in the context of any new licensing framework we may adopt. The Commission's broad discretion to change its regulatory approach in response to changing circumstances is well settled. *See* Telocator Network of America v. FCC, 691 F.2d 525, 540 (D.C. Cir. 1982). If waiting lists are eliminated, all applications pending on waiting lists would be returned without further action only after the final rules in this proceeding become effective. *See* Storer Broadcasting Co. v. FCC, 351 U.S. 192 (1956) (the Commission has authority to make rules that are prospective in nature, leading to dismissal of applications without a hearing); Bowen v. Georgetown University Hospital, 488 U.S. 204, 220 (1988) (Scalia, J., concurring) (where a rule "merely affect[s] past transactions" rather than "chang[ing] what was the law in the past," it may be upheld if reasonable).

[64] Wide area licensees will not, of course, be required to protect existing facilities authorized on a secondary basis. Such sites must not cause interference to facilities authorized on a primary basis and are not protected from interference from facilities authorized on a primary basis. *See* 47 C.F.R. § 90.07 (defining secondary operations).

[65] In a separate proceeding we are considering amendments to co-channel protection criteria for licensed facilities operating above 800 MHz. Any changes adopted in that proceeding will apply to facilities licensed as a result of this proceeding. *See* Notice of Proposed Rule Making, PR Docket 93-60, adopted March 11, 1993, 58 Fed Reg 19396 (1993).

[66] *See* proposed rule 47 C.F.R. § 90.673(d) in Appendix A. *See also* 47 C.F.R. §§ 90.177, 1.1307, 1.1312, 17.7, and 90.621.

[67] Signal strength at the boundaries would be calculated using the Commission's R6602 F(50,10) curves with a 9 dBu correction factor for mobile use. Each application to construct or modify a facility that is part of the wide area system will be required to include an engineering study demonstrating compliance with this limit.

3. Efficient use of the spectrum

37. Because spectrum is a scarce resource, it is in the public interest that it be used efficiently.[68] Under our existing SMR rules we measure the efficiency of spectrum use in terms of number of mobiles operating on a particular channel.[69] For the more traditional, single-site SMR system this yields an unambiguous measurement of channel use. Attempting to apply this same standard to wide-area systems, however, does not yield a relevant measure of spectrum use. Currently, applicants applying for a wide-area authorization are permitted to measure channel usage by counting the number of mobiles using the entire system with respect to the number of discrete frequencies used in the system.[70] We question whether counting mobiles per discrete frequency is an appropriate method for determining system capacity. Substantial differences in the calculation of system usage can exist among wide-area systems that employ the same number of discrete channels but apply different technologies, have different patterns of frequency reuse, or use the channels over different sized areas. Additionally, considering the wide variety of services that we anticipate SMR systems will offer in the future, including extensive interconnection with the public switched telephone network, transmission of data, and various personal communications services, our traditional "mobile per channel" measurement of spectrum use may no longer yield a relevant estimate of a system's usage. No commenter has, as yet, proposed a viable alternative measurement of spectrum use. Accordingly, we propose that EMSPs not be required to meet any particular mobile loading standard. We request comment, however, on whether some other method of measuring spectrum use, such as minimum air time per channel, is appropriate.

38. AMTA proposes that we grant wide-area licenses only to applicants certifying that they will use technology that provides at least twice the capacity of analog technology.[71] Some commenters to AMTA's proposal have suggested even more stringent standards.[72] We do not believe that such a requirement is necessary or appropriate. In creating EMSP licenses we are primarily trying to facilitate the SMR industry's transition to wide-area systems. Implementation of such systems does not necessarily require the use of advanced technologies and thus we do not intend to force licensees to use such potentially costly technologies, especially in areas where they may not be needed or cost effective. Instead, we believe that EMSPs will implement a wide variety of advanced technologies voluntarily when they perceive sufficient customer demand for the enhanced services that would result. Accordingly, we do not propose to mandate that EMSPs use advanced technology. We request comment, however, on whether such a requirement might be appropriate and, if so, whether it should be limited to only frequency-congested BTA/MTAs or to certain frequency-congested areas within BTA/MTAs. Additionally, if such a requirement is appropriate, is there a definitive measurement for the increase in capacity or is this too subjective a concept to serve as a meaningful condition of the EMSP license, especially considering that we have stated that mobile loading is not generally relevant to the proposed EMSP systems?

4. Construction Requirements

39. Finally, we examine the construction requirements for wide-area systems. Unlike either the 220-222 MHz and 900 MHz bands, there are already many systems operating in the 800 MHz band. In most major markets, 800 MHz SMR systems are congested and in need of additional capacity. Rather than follow the pattern of the construction requirements for 220-222 and 900 MHz systems,[73] the construction requirements adopted for 800 MHz systems must consider that this is a mature market and many 800 MHz wide-area systems will be produced by converting existing systems into more efficient systems that provide increased capacity. We propose that an 800 MHz EMSP system be required to ultimately cover either 80 percent of the land area or serve 80 percent of the population within its BTA/MTA.[74] We consider a licensee to provide service if it provides a signal strength of 40 dBu or greater to that area. We propose that licensees have up to five years after the license grant to meet this requirement.[75] If the EMSP system does not meet the coverage requirement five years from the date of EMSP license grant we propose that the licensee lose the exclusive right to use its channels throughout the BTA/MTA. Such a licensee would be permitted to continue to operate any stations already constructed and in operation, and these facilities would be protected in accordance with Section 90.621(b) of our rules, but the licensee would not be permitted to continue constructing or modifying stations on these channels throughout the BTA/MTA. Additionally, a licensee that loses its EMSP license would not be permitted to reapply for another EMSP license in the same market for six months from the date the EMSP license is cancelled. We request comment on this proposal and whether there are other, more effective means for ensuring that EMSPs meet their conditions of license. We also request comment on whether the time provided for a licensee to construct its system be dependent in some way on the size of the proposed system (i.e., number of proposed transmitter sites, size of the BTA/MTA, or number of channels to be included in the system)? Additionally, we request comment on whether the same construction standard should apply for new licensees as well as licensees that are converting existing constructed and operational stations to wide-area operations? Should we require a new licensee to meet a benchmark, such as requiring the new licensee to serve 20 percent of the area or population in the BTA/MTA two years after license grant?

40. In addition to the above requirements we propose an additional requirement for any applicants that wish to construct their system over an extended period of up to five years. Currently, the licensee of a trunked SMR system has

---

[68] *See* 47 U.S.C. § 332(a)(2).

[69] *See* 47 C.F.R. § 90.631(a). This Section states that channels are authorized using a loading criterion of 100 mobiles per channel.

[70] *See* Weisman letter, *supra* note 14.

[71] AMTA Blueprint at 6.

[72] Fleet Call comments at 9.

[73] *See, e.g.*, 47 C.F.R. § 90.725.

[74] We do not propose to require that every channel included in the EMSP license meet this coverage requirement.

[75] *See* Report and Order, Amendment of Part 90 of the Commission's Rules Governing Extended Implementation Periods, PR Docket No. 92-210, adopted May 13, 1993, FCC Rcd (1993).

one year to complete construction and place the station in operation.[76] We have, however, routinely waived this requirement to grant existing 800 MHz SMR licensees five years to convert to wide-area operations.[77] Because of the flexibility and inherent value of an EMSP license, which gives the licensee the exclusive right to apply to reuse a large number of channels throughout a BTA/MTA, we believe that it is necessary to impose on EMSP licensees additional prerequisites to obtaining extended implementation authority. Accordingly, we propose that EMSP licensees be required to make a reasonable estimate of the cost of constructing a system that would meet our minimum coverage requirements and to place a sum equal to this estimate in an escrow account or obtain a performance bond in that amount. We propose that EMSPs that include existing facilities in their EMSP systems not be required to include the cost of those stations in their estimate. For example, if an EMSP has existing facilities operating on its EMSP channels that provide coverage to 50 percent of either the population or area of the BTA/MTA, the licensee would only submit an estimate of the cost to construct stations to cover an additional 30 percent of either the population or area of the BTA/MTA. The licensee would place that amount in an escrow account or would obtain a performance bond in that amount.[78] In such an case, the EMSP license application must clearly indicate how much of the minimum construction requirements are satisfied by existing stations. A licensee that has enough existing stations at the time the EMSP license is granted to satisfy the minimum construction standards would not be required to place funds in an escrow account or purchase a performance bond. We propose to permit an EMSP licensee that places funds in escrow to withdraw funds from the escrow account in accordance with the cost estimates of the original construction schedule, to cover the ongoing costs of constructing the EMSP system.[79] If the licensee withdraws funds in excess of the amount approved by the Commission, then the underlying EMSP license would cancel automatically. We request comment on this proposal regarding withdrawal of escrowed funds. If a licensee that placed funds in escrow later failed to fulfill the coverage requirements, any remaining funds held in escrow would be paid to the United States Treasury. In the alternative, an EMSP licensee could elect to post a performance bond, with the United States Treasury named as the beneficiary. The licensee's failure to satisfy our coverage requirements would trigger payment of the applicable performance bond amount to the United States Treasury.[80] The requirement that EMSP licensees post a bond or place funds in escrow could serve as an incentive to the licensee to make productive use of the spectrum resource, and, in the event that the licensee fails to fulfill the minimum construction requirements within five years, the funds would serve as a mechanism to compensate the public for the spectrum being encumbered and not used in a productive manner. Any licensee that does not place sufficient funds earmarked for construction of its wide-area system in an escrow account, or post a bond for that amount, will be required to construct its system in one year.

41. We ask for comment on the legal justification for requiring the posting of a bond or establishment of an escrow account, whether the amount of the escrow or bond reasonably relates to the loss that would be suffered by the public in the event the licensee fails to construct, and whether the escrow or bond provides a means of ensuring that the licensee will put the spectrum to use in a manner consistent with the public interest. We also ask for comment on whether the escrow or bond amount should correspond to a value the Commission places on an EMSP system rather than the cost estimated by an applicant, and if so, we seek data to be included in the record that would reliably project such costs. We also ask commenters to discuss whether EMSP systems should be authorized a reduced extended implementation period of three years to construct an EMSP system and place it in operation, with the possibility of receiving a five year extended implementation period if they volunteer to post a performance bond or place funds in escrow. We further request comment on alternatives the Commission could consider to encourage productive use of the spectrum by EMSP licensees. For example, we could condition the entire EMSP license on timely meeting our coverage requirements, with failure to meet these conditions resulting in automatic cancellation of *all* stations covered by the EMSP license, including those constructed and placed in operation. In addition, we request comment on the effect that authority to award licenses by competitive bidding would have on the issue of assuring that licensed spectrum is used productively. Would the cost of obtaining a license through competitive bidding be sufficient to assure its productive use, or would additional safeguards remain necessary?

42. To prevent trafficking in licenses, we now restrict transfers of unconstructed private land mobile licenses. Licensees in the 800 MHz SMR service may not assign or transfer a license prior to completing construction of the facility.[81] Nationwide commercial licensees in the 220-222 MHz band may not assign the nationwide license until at least 40 percent of the system is constructed. These licenses may not be partially assigned.[82] Similarly, we have proposed that 900 MHz nationwide and regional licensees not be permitted to assign their license until 40 percent of their system is constructed and that partial assignment of these licenses not be allowed.[83] For 800 MHz, we propose

---

[76] *See* 47 C.F.R. §§ 90.631(e) and (f).

[77] We have adopted a Report and Order today which essentially codifies this practice. *See* Report and Order, PR Docket No. 92-210, *supra* note 75.

[78] If a licensee elects to post a performance bond, we would require that the surety company be deemed acceptable within the meaning of 31 U.S.C. § 9304 *et. seq.* (*See, e.g.* Department of the Treasury Fiscal Service, Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and As Acceptable Reinsuring Companies, 57 Fed. Reg. 29356 (1992)) and that the United States Treasury be the named beneficiary in the event of the licensee's default. *See* proposed section 90.677.

[79] See proposed 47 C.F.R. § 90.677.

[80] The surety could establish an incremental payment schedule whereby the amount paid to the Treasury in the event of default would track the EMSP licensee's actual performance in meeting the coverage requirements. Thus, for example, as the licensee comes closer to meeting the coverage requirements, the amount paid by the surety in the event of default could decrease proportionately.

[81] *See* 47 C.F.R. § 90.609(b).

[82] *See* 47 C.F.R. §§ 90.709(a)(3),(d).

[83] *See 900 MHz Phase II*, 8 FCC Rcd at 1477 n.74.

that an EMSP not be permitted to assign its license for at least three years, and in no event will transfer be permitted before construction has been completed. We further propose to permit an 800 MHz EMSP to make a partial assignment of its license, but only after fulfilling the construction requirements. We propose that a licensee not be permitted to assign its license in a portion of the BTA/MTA. Rather, the licensee could make a partial assignment for a portion of its channels throughout the BTA/MTA. Licensees could, however, lease their licensed EMSP spectrum at any time for either the entire BTA/MTA or a portion of the BTA/MTA, and could count any use of leased spectrum toward completion of their construction requirements. We ask for comment on this proposal, especially whether any restriction on transfers or assignments is necessary given the mature nature of the 800 MHz SMR market.

IV. CONCLUSION

43. We adopt this *Notice of Proposed Rule Making* to solicit public comment regarding the accommodation of wide-area Specialized Mobile Radio systems in the 800 MHz band. This *Notice* proposes amendment of Part 90 of our Rules to establish a framework for licensing wide-area SMR systems. The proposed rule changes are set forth in Appendix A.

V. PROCEDURAL MATTERS

Regulatory Flexibility Act

44. An Initial Regulatory Flexibility Analysis is contained in Appendix B to this *Notice of Proposed Rule Making*. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix B. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

Ex Parte Rules - Non-Restricted Proceeding

45. This is a non-restricted notice and comment rule making proceeding. *Ex Parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

Comment Dates

46. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **July 19, 1993,** and reply comments on or before **August 5, 1993**. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the F.C.C. Reference Center of the Federal Communications Commission, Room 239, 1919 M Street, N.W., Washington, DC 20554.

Ordering Clause

47. Authority for issuance of this *Notice of Proposed Rule Making* is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r).

Contact Persons

48. For further information concerning this proceeding, contact Julia Kogan, Steve Sharkey, Rosalind Allen or Martin Leibman, Private Radio Bureau, (202) 632-7125 or 634-2443.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Parts 1 and 90 of Chapter 1 of Title 47 of the Code of Federal Regulations are proposed to be amended as follows:

Part 1 - Practice and Procedure.

1. The authority citation for Part 1 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303: Implement, 5 U.S.C. 552 and 21 U.S.C. 853a, unless otherwise noted.

2. Section 1.1102 is amended by adding 6.a.(ix) and 6.b.(ix) to read as follows:

§ 1.1102 Schedule of charges for private radio service

Action	FCC Form No.	Fee amount	Fee type code	Address
		* * * * * * *		
6. * * *				
a. * * *				
		* * * * * * *		
(ix) EMSP license	FCC 574	35	PAL	Federal Communications Commission, EMSP License P.O. Box _____, Pittsburgh, PA 15251-5360
b. * * *				
		* * * * * * *		
(ix) EMSP license	FCC 574	35	PAL	Federal Communications Commission, EMSP License P.O. Box _____, Pittsburgh, PA 15251-5360
		* * * * * * *		

Part 90 - Private Land Mobile Radio Services.

3. The authority citation for Part 90 continues to read as follows:

Authority: Section 4, 303, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, and 332, unless otherwise noted.

4. Section 90.7 is amended by adding the definition for "EMSP license" following the definition for "Effective Radiated Power" to read as follows:

§ 90.7 Definitions

* * * * *

EMSP License. A license authorizing an Expanded Mobile Service Provider (EMSP) the exclusive right to reuse specified SMR Category channels at base stations located throughout one of the 47 Major Trading Areas defined in the *Rand-McNally 1992 Commercial Atlas and Marketing Guide,* 123rd Edition.

* * * * *

5. Section 90.135 is amended by revising paragraph (a) introductory text to read as follows:

§ 90.135 Modification of license.

(a) Except as provided in § 90.673, the following changes in authorized stations require an application for modification of license:

* * * * *

6. Section 90.159 is amended by revising paragraph (b) introductory text to read as follows:

§ 90.159 Temporary and conditional permits.

* * * * *

(b) An applicant proposing to modify an EMSP license may operate the proposed facility for a period of up to 180 days under a conditional permit in accordance with § 90.673. An applicant proposing to operate a new private land mobile radio station or modify an existing station below 470 MHz, or in the one-way paging 929-930 MHz

band that is required to submit a frequency recommendation pursuant to §§ 90.175(a)-(e) may operate the proposed station during the pendency of its application for a period of up to 180 days under a conditional permit upon the filing of a properly completed formal application that complies with § 90.127 if the application is accompanied by evidence of frequency coordination in accordance with §§ 90.175 and 90.176, and provided that the applicant certifies that the following conditions are satisfied:

* * * * *

7. Section 90.609 is amended by revising paragraphs (a) introductory text, (d)(3), and (d)(7) to read as follows:

§ 90.609 Special limitations on amendment of applications for assignment or transfer of authorizations for radio systems above 800 MHz.

(a) No application for a conventional or trunked radio system may be amended so as to substitute a new entity, except as provided in § 90.669(b) for EMSP systems, or in the following circumstances:

* * * * *

(d) * * *

(3) For all trunked systems that are not SMRs, the assignment application must include a statement from the trunked system's own frequency coordinator verifying that there are no available frequencies in the trunked system's service category in the frequency bands 806-824/851-869 MHz (trunked systems that are SMRs must demonstrate that there are no SMRS Category channels available at the base station coordinates in lieu of this requirement).

* * * * *

(7) As a result of the assignment the assignee must have a number of channels that does not exceed one channel more than its current loading warrants.

* * * * *

8. Section 90.611 is amended by revising paragraphs (c) and (d) to read as follows:

§ 90.611 Processing of applications.

* * * * *

(c) Each application will be reviewed to determine whether it can be granted. Applications for frequencies in the Public Safety, Business, Industrial/Land Transportation, and General Categories must specify the intended frequency (or frequencies) of operation. Except as specified in § 90.663, applicants for frequencies in the SMRS Category may either specify the intended frequency (or frequencies) of operation in accordance with the provisions of § 90.621 or request that the Commission make the selection.

(d) Applications for channels in the SMR category that cannot be granted due to a lack of available channels in a particular area will be dismissed. Where channels are available but the number of applications for channels received on the same day exceeds the number of channels, we will grant licenses to operate on the channel(s) through our random selection procedures. *See* § 1.972 of this Chapter. *See also* § 90.671 for procedures on processing applications for SMR channels to be included in an EMSP license.

* * * * *

9. Section 90.621 is amended by revising paragraphs (a) introductory text, (a)(1) introductory text, (b) introductory text, (g)(3)(i), and (g)(3)(ii), to read as follows:

§ 90.621 Selection and assignment of frequencies.

(a) Applicants for frequencies in the Public Safety, Industrial/Land Transportation, Business, and General Categories must specify on the application the frequencies on which the proposed system will operate pursuant to a recommendation by the applicable frequency coordinator. Applicants for frequencies in the SMRS Category, except EMSP license applicants, may either request specific frequencies by including in their applications justification for the frequencies requested or request that the Commission select frequencies for the system from the SMRS Category.

(1) For trunked systems, other than EMSP systems, the assignment of frequencies will be made in accordance with applicable loading criteria and in accordance with the following:

* * * * *

(b) Systems authorized on frequencies in the SMRS Category, except as described in § 90.675(b), will be afforded protection solely on the basis of fixed distance separation criteria. Only co-channel interference between base station operations will be taken into consideration. Adjacent channel and other types of possible interference will not be taken into account. The ordinary separation between co-channel systems will be 113 km (70 miles) with the following exceptions:

* * * * *

(g) * * *

(3) * * *

(i) For non-SMR applicants, the application must include a statement from the applicant's own frequency coordinator verifying that there are no available frequencies in the applicant's service category in the frequency bands 806-824/851-869 MHz. For SMR applicants, the application must '" demonstrate that no SMRS Category frequencies are available in the 806-824/851-869 MHz frequency bands at the base station coordinates.

(ii) As a result of the addition of any unused channels in the General Category to an existing trunked system, the number of channels that may be assigned to the station(s) authorized to operate that system may not exceed one channel more than its current loading warrants.

* * * * *

10. Section 90.627 is amended by revising paragraphs (a) and (b)(3), and by adding new paragraph (b)(4) to read as follows:

§ 90.627 Limitation on the number of frequency pairs that may be assignable for trunked systems and on the number of trunked systems.

(a) The maximum number of frequency pairs that may be assigned at any one time for the operation of a trunked radio system is twenty, except as specified in §§ 90.621(a)(1)(iv) and 90.667.

(b) * * *

(3) A licensee of an SMR system in the 806-821/851-866 MHz bands seeks authorization to operate an SMR system in the 896-901/935-940 MHz bands; or,

(4) The channels requested are part of the licensee's EMSP system as described in § 90.661.

11. Section 90.629 is amended by revising paragraph (a) introductory text to read as follows:

§ 90.629 Extended implementation schedules.

* * * * *

(a) Except for EMSP systems as provided in § 90.677, the applicant must justify an extended implementation period. The justification must include an implementation schedule for construction of the complete system, *including* a detailed description of the applicant's proposed system, benchmarks for construction of the proposed base stations (including identification of channels to be constructed at each station at each of the indicated benchmarks), and must show that:

* * * * *

12. Section 90.631 is amended by revising the first sentence of paragraphs (a), (b) and (f), and by revising paragraphs (c), (d) and (e) to read as follows:

§ 90.631 Trunked systems loading, construction and authorization requirements.

(a) Trunked systems, except EMSP systems, will be authorized on the basis of a loading criterion of 100 mobile stations per channel. * * *

(b) Each applicant for a trunked system, except applicants for EMSP systems, shall certify that a minimum of 70 mobiles for each channel authorized will be placed in operation within five years of the initial license grant. * * *

(c) Except as provided in § 90.667 and paragraph (d) of this section, an applicant seeking to expand a trunked system by requesting additional channels from the Commission, or through intercategory sharing, or through an assignment must have a loading level of 70 mobiles per channel on the existing system that is the subject of the expansion request.

(d) In rural areas, a licensee of a trunked system may request to increase its system capacity by five more channels than it has constructed without meeting the loading requirements specified in paragraphs (b) and (c) of this section. A rural area is defined for purposes of this section as being beyond a 100-mile radius of the designated centers of the following urbanized areas: New York, NY; Los Angeles, CA; Chicago, IL; Philadelphia, PA; San Francisco, CA; Detroit, MI; Boston, MA; Houston, TX; Washington, DC; Dallas-Fort Worth, TX; Miami, FL; Cleveland, OH; St. Louis, MO; Atlanta, GA; Pittsburgh, PA; Baltimore, MD; Minneapolis-St. Paul, MN; Seattle WA; San Diego, CA; and Tampa-St. Petersburg, FL. The coordinates for the centers of these areas are those referenced in § 90.635, except that the coordinates for Tampa-St. Petersburg are latitude 28°00'00" N. longitude 82°27'00" W.

(e) Except as provided in §§ 90.629 and 90.677, licensees of trunked facilities must complete construction within one year.

(f) If a station is not placed in permanent operation, in accordance with the technical parameters of the station authorization, within one year, except as provided in §§ 90.629 and 90.677, its license cancels automatically and must be returned to the Commission. * * *

* * * * *

13. Section 90.651 is amended by revising paragraph (d) to read as follows:

§ 90.651 Supplemental reports required of licensees authorized under this subpart.

* * * * *

(d) Licensees of trunked systems, except EMSP systems, must report to the Commission's Private Radio Bureau, Licensing Division, Land Mobile Branch in Gettysburg, PA 17326, within thirteen months of the date of the grant, whether or not construction of the facility has been completed.

14. Section 90.658 is amended by revising paragraph (a) to read as follows:

§ 90.658 Loading data required for base station licensees of trunked Specialized Mobile Radio systems to acquire additional channels or to renew trunked systems licensed before June 1, 1993.

(a) Except for EMSP licensees, a base station licensee of a trunked Specialized Mobile Radio system that applies for additional channels to expand an existing system or to construct a new system within 40 miles of its existing system, or a base station licensee of a trunked system applying for its first renewal in an urban area as defined in § 90.631(d) for a system licensed before June 1, 1993 must identify on the appropriate application form the number of mobiles and control stations loaded on its system as calculated in paragraph (b) of this section.

* * * * *

15. Subpart S is amended by adding a new heading following Section 90.659 to read as follows:

POLICIES GOVERNING THE LICENSING AND USE OF EXPANDED MOBILE SERVICE PROVIDER (EMSP) SYSTEMS IN THE 806-821 AND 851-866 MHZ BANDS.

16. A new section 90.661 is added to Subpart S to read as follows:

§ 90.661 Expanded Mobile Service Provider Systems.

EMSP licenses on SMR Category channels in the 806-821 and 851-866 MHz bands are available for each of the 47 Major Trading Area (MTAs) as described in the *Rand-McNally 1992 Commercial Atlas and Marketing Guide,*

123rd Edition. EMSP licensees have the exclusive right to construct and operate base stations using the SMR Category frequencies identified in the EMSP license anywhere within the MTA except that:

(a) The EMSP licensee must protect, in accordance with § 90.621(b), all previously-authorized co-channel stations and all previously filed applications for co-channel facilities that are not associated with another EMSP license.

(b) The EMSP licensee must comply with any rules and international agreements that restrict use of its EMSP channels in certain areas.

(c) The EMSP licensee must protect co-channel EMSP licensees in adjacent MTA regions in accordance with § 90.675(b).

17. A new Section 90.663 is added to Subpart S to read as follows:

§ 90.663 Channels available for EMSP systems.

Any SMR category channel in the 806-821/851-866 MHz band as listed in Table 4A of Section 90.617 may be included in an EMSP license. An EMSP license will not be comprised of channels from any other 800 MHz Service Category.

18. A new Section 90.665 is added to Subpart S to read as follows:

§ 90.665 Filing of Applications for EMSP licenses.

(a) Applications for EMSP licenses will be accepted in two stages. For the first stage, an "initial filing period" will be designated during which applications for EMSP licenses in each MTA will only be accepted from applicants who:

(1) are licensed for SMR Category channels in the MTA on or before May 13, 1993; and

(2) are operating these channels on constructed base stations in the MTA on the date the EMSP license application is filed.

(b) An existing SMR licensee may only include each of its licensed channels in a single EMSP application in the MTA where the channels are currently licensed and operating on constructed base stations.

(c) A person or entity that is not licensed for 800 MHz SMR Category channels operating on constructed base stations within a particular MTA may not have any interest in more than one application for an EMSP license in that MTA.

(d) All applications for EMSP licenses must be submitted in accordance with § 0.401 of the rules and must be accompanied by the appropriate fee as set forth at Part 1, Subpart G of this Chapter.

(e) The Commission shall announce by Public Notice information that must be submitted as a part of the EMSP license application and supplements, as well as the required format for submission of these filings. The Commission will require that EMSP applications be filed electronically if, at the time EMSP applications are accepted for filing, the Commission has adequate data management resources to receive such applications. At a minimum EMSP applications must include:

(1) The MTA for which the applicant is applying;

(2) All frequencies to be included in the EMSP system;

(3) For frequencies that the applicant is authorized to use within the MTA at the time the EMSP application is filed, the applicant must include:

(i) The call sign under which the applicant is authorized to operate the channels;

(ii) Certification that the frequencies are constructed and in operation as of the date the EMSP application is filed; and

(iii) The coordinates of the station(s) at which the frequencies are operating.

(4) Certification that the applicant will meet the construction requirements set forth in § 90.677;

(5) A plan consisting of a schedule for the construction of the base stations of the proposed system, an estimate of the costs for constructing the system and a description of how the proposed system will satisfy the coverage requirements of § 90.677. This plan need not specify base station coordinates. The estimate of the costs of constructing and implementing the system must include individual estimates for the costs of constructing each base station facility and must be accompanied by a thorough justification of the method used to calculate these costs. To the extent that the proposed system includes existing facilities that are constructed and operating, the EMSP applicant must demonstrate the percentage of the coverage requirements of § 90.677 that will be satisfied by such existing facilities.

(6) If the applicant seeks an extended implementation period (*see* § 90.677(c)), certification that, within 30 days of grant of its application, the licensee will place funds in an escrow account or obtain a performance bond equal to the estimated cost of constructing the proposed system.

(7) An indication of the minimum number of EMSP channels that the applicant would find acceptable in the event that channels specified in the application cannot be included in the EMSP license because they are included in a previously granted EMSP authorization. Applications for which this minimum cannot be granted will be dismissed.

19. A new Section 90.667 is added to Subpart S to read as follows:

§ 90.667 Limitation on the number of channels assignable for an EMSP license.

(a) Except as specified in paragraph (b), the maximum number of channel pairs that will be assigned to an EMSP licensee at one time is 42 per MTA.

(b) During the initial filing period, applicants for EMSP licenses may request any number of channel pairs to be included in the EMSP license. Any channels requested, however, must meet the requirements of § 90.665(a).

(c) Except as provided in paragraph (d), an EMSP licensee may not request additional EMSP channels until it has fully satisfied the requirements of § 90.677(b) for its EMSP license within the particular MTA.

(d) An EMSP licensee granted less than 42 channels within an MTA during the initial filing period may apply for additional EMSP channels prior to meeting the requirements of § 90.677(b). The total number of EMSP channels pairs not satisfying the requirements of § 90.677(b) may not, however, exceed 42 channels within the particular MTA.

20. A new Section 90.669 is added to Subpart S to read as follows:

§ 90.669 Limitations on amendment of applications for assignment or transfer of EMSP radio systems.

(a) Except as indicated in paragraph (b) of this section, the Commission will not consent to the following:

(1) Any request to amend an EMSP license application to substitute a new entity as the applicant;

(2) Any application to assign or transfer a license for an EMSP system before the licensee has fulfilled the construction requirements described in § 90.677(b) or three years from the date the EMSP license was granted, whichever is longer.

(b) The Commission will grant the applications described in paragraph (a) of this section if:

(1) The request to amend an EMSP application or to transfer or assign an EMSP license does not involve a substantial change in ownership or control of the applicant; or

(2) The changes in the ownership or control of the EMSP applicant are involuntary due to the original applicant's insolvency, bankruptcy, incapacity, or death; or

(3) The changes in the ownership or control of the EMSP applicant are necessary to resolve a conflict between mutually exclusive applications, the application is submitted within the 60-day period designated for applicants to resolve mutually exclusive applications and no consideration has passed between negotiating entities in exchange for amendment of the application. *See* § 90.671(b).

(c) The assignee or transferee of an EMSP system is subject to the construction and reporting requirements of § 90.677, and will receive the assignor's license expiration date.

(d) The Commission will not consent to any request to amend an EMSP application if any consideration has passed between negotiating entities in exchange for amendment of the application.

(e) EMSP licensees that have fully satisfied the requirements of § 90.677(b) may partially assign the EMSP license. The Commission will only accept applications for partial assignment proposing exclusive use of one or more EMSP channels throughout the MTA region. The Commission will not accept any application proposing to assign the use of the EMSP channels in limited geographic areas of an MTA.

21. A new Section 90.671 is added to Subpart S to read as follows:

§ 90.671 Processing of EMSP applications.

Applications for EMSP licenses will be processed as follows:

(a) All applications recieved will be given a file number. The assignment of a file number is for administrative convenience and does not represent a determination that the application is acceptable for filing. Applications will then be considered to determine whether they are substantially complete and acceptable for filing. If so, they will be put in pending status. If not, they will be returned to the applicant.

(b) All applications in pending status will be examined to determine whether they are mutually exclusive. Any applications received during the initial filing period and specifying *any* of the same frequencies will be considered mutually exclusive. EMSP applications received after the initial filing period ends will be processed on a first-come, first-served basis, in the order they are received by the Commission in its Gettysburg, PA office (or the address set forth at § 1.1102 of this chapter for applications requiring the fees established by Part 1, Subpart G of this Chapter). Such applications will be considered mutually exclusive if they are filed on the same day for *any* of the same frequencies in the same MTA. Applications that are not mutually exclusive and are otherwise acceptable will be granted.

(c) Applicants that file mutually exclusive applications will be designated for random selection by Public Notice and will receive 60 days from the date the Public Notice appears in the Federal Register to amend their applications to resolve the mutual exclusivity. Mutually exclusive applications that are amended to resolve overlapping requests for channels, and that are otherwise acceptable, will be granted. The Commission will rank order any remaining mutually exclusive applications by random selection. Applications will then be granted in order of their ranking, pursuant to § 1.972 of this chapter. Channels specified in an application that conflict with a previously granted EMSP license will be deleted from the application and the application will be granted for any remaining channels unless otherwise indicated in the application. *See* § 90.665(e)(7).

22. A new Section 90.673 is added to Subpart S to read as follows:

§ 90.673 Modification of EMSP license.

(a) The following changes to an EMSP system require an application for modification of the EMSP license:

(1) Addition of a new base station

(2) Change in location of an authorized base station

(3) Change in frequency of an authorized base station

(4) Change in power of an authorized base station

(5) Change in antenna height of an authorized base station

(6) Any change in ownership, control, or corporate structure

(b) Applications to modify an EMSP license must be filed electronically in a format to be announced by Public Notice.

(c) Applications to modify an EMSP license must include a list of all relevant co-channel facilities, not under the control of the EMSP licensee, including call signs, coordinates, effective radiated power, antenna height above average terrain, applicable directional antenna heights above average terrain, and a certification that the proposed modification complies with section 90.621(b).

(d) An EMSP licensee can operate a proposed new or modified station that is to be included in its EMSP system during the pendency of the EMSP modification application for a period of up to 180 days under a conditional permit (*See* § 90.159) provided that:

(1) The applicant has submitted an application to the Commission satisfying the requirements of paragraph (c) of this section;

(2) The facility provides the required protection to certain locations in accordance with § 90.177;

(3) The facility will not have a significant environmental effect, as described in § 1.1307 of this chapter;

(4) The facility does not require notification to the Federal Aviation Administration as described in § 17.7 of this chapter;

(5) The facility does not require a coordination in accordance with an international agreement;

(6) The facility's proposed operation does not require waiver of any of the Commission's Rules.

(e) Conditional authorization pursuant to paragraph (d) is evidenced by retaining the original executed conditional licensing 572C Certification Form with the station records. Conditional authorization does not prejudice any action the Commission may take on the subject application. Conditional authority is accepted with the express understanding that such authority may be modified or cancelled by the Commission at any time without hearing if, in the Commission's discretion, the need for such action arises.

23. A new Section 90.675 is added to Subpart S to read as follows:

§ 90.675 Limitations on use of EMSP channels

(a) EMSP licensees must provide co-channel protection, in accordance with § 90.621(b), to any previously authorized co-channel facilities or previously filed co-channel applications that are not licensed to the EMSP licensee. This includes all co-channel facilities, whether inside or outside of the MTA in which the licensee is authorized.

(b) The signal field strength of any base station that is part of the EMSP system cannot exceed 22 dBu at the border of the MTA region, except when:

(1) The station was constructed and placed in operation on the EMSP channels, before the EMSP license was granted. In such instances, the licensee will not be permitted to increase the signal field strength at the border of the MTA above the field strength created by the facility at the time the EMSP license was granted, unless the conditions in subparagraph (2) below are met.

(2) The EMSP licensee submits with its application for the licensing of base stations letters of concurrence from affected co-channel EMSP licensees indicating agreement to accept any interference resulting from the increased signal strength at the MTA border. The applicant must also certify, pursuant to § 1.47, that all concurring co-channel licensees have been served with an actual copy of the application.

24. A new Section 90.677 is added to Subpart S to read as follows:

§ 90.677 Authorization, Construction and Implementation of EMSP Systems.

(a) EMSP authorizations will be issued for a term not to exceed five years. (*See* § 90.149.)

(b) Except as provided in paragraph (c), an EMSP licensee must, within one year, construct and place in operation a sufficient number of base stations to provide coverage to at least 80 percent of either the land area or the population of the MTA. Although each individual channel does not have to provide the required coverage, each channel must be constructed on an operating base station within the MTA. Within thirteen months from grant of the license or as part of the application to renew its authorization if the licensee has been granted an extended period to implement its system, the EMSP licensee must provide the Commission with one or more U.S. Geological survey map(s) of the MTA with a 1:25 0,000 scale. The map(s) must depict all of the licensee's authorized base station sites within the MTA, and their respective 40 dBu contours as determined from the Commission R6602 F(50,50) curves with a 9 dBu adjustment (*See* § 73.699). The licensee must also include a description of how the depicted stations cover the required land area or population of the MTA. If the licensee does not believe that the R6602 curves accurately predict the 40 dBu contours, then the licensee must explain and justify, including all supporting data and calculations, any alternative method used to calculate these contours.

(c) An EMSP licensee will be granted an extended implementation period of five years to fulfill the requirements of paragraph (b) if:

(1) The licensee requested, in its EMSP license application, an extended implementation period; and

(2) The licensee places funds equal to the cost estimate, filed pursuant to § 90.665(d)(5), for construction and implementation of the proposed system in an escrow account, or posts a performance bond sufficient to guarantee costs equal to that estimate, within 30 days of the EMSP license grant.

(d) An EMSP licensee that places funds in escrow to obtain an authorization term that exceeds one year, as provided in paragraph (c), must provide the Commission with the name of the financial institution that holds the escrow account and the account number. The licensee may withdraw funds from the escrow account to cover the ongoing costs of constructing the EMSP system. Funds may only be withdrawn, however, after the Commission has issued a license for a station and only in the amount that the original construction schedule, submitted with the

EMSP license application, specified as the estimated construction costs for an individual station. The licensee must specify in each application to add or modify a facility the amount that the licensee intends to withdraw from the escrow account, and must supply with each application a statement from the financial institution holding the escrow account the account balance at the time a modification application is filed. The amount of funds to be withdrawn is subject to review and modification by the Commission. If the licensee withdraws funds in excess of the amount approved by the Commission, then the underlying EMSP license cancels automatically. If an EMSP licensee fails to satisfy the requirements of paragraph (b) or if its license cancels because the licensee withdrew excess funds, any funds remaining in the escrow account will be forfeited to the United States Treasury.

(e) If the EMSP licensee elects to post a performance bond to obtain an authorization term that exceeds one year, as provided in paragraph (c), the surety company must be deemed acceptable within the meaning of 31 U.S.C. § 9304 *et. seq.* (*See, e.g.* Department of the Treasury Fiscal Service, Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and As Acceptable Reinsuring Companies, 57 Fed. Reg. 29356 (1992)) and the United States Treasury must be named the beneficiary in the event of the licensee's default. The EMSP licensee must provide the Commission with a copy of the performance bond, including all details and conditions.

(f) If the construction and implementation requirements of paragraph (b) are not satisfied within the authorized term, then the EMSP license cancels automatically and must be returned to the Commission. The licensee will, however, retain an SMR Category license for any stations already constructed and placed in operation at the time that the EMSP license cancelled. The licensee may continue to operate these stations, but it loses the exclusive right to apply to reuse the EMSP channels throughout the MTA. The licensee may not apply again for an EMSP license in that MTA for a period of six months from the date that the former EMSP license cancelled.

25. A new Section 90.679 is added to Subpart S to read as follows:

§ 90.679 Station Identification for EMSP Systems.

EMSP licensees must comply with the station identification requirements of § 90.647. All stations operating as part of the EMSP system must identify themselves using the call sign issued for the entire EMSP system.

APPENDIX B

INITIAL REGULATORY FLEXIBILITY ANALYSIS

1. *Reason for Action:* This rule making proceeding is initiated to obtain comment regarding whether marketplace developments should lead the Commission to change Part 90 of its Rules. The Part 90 changes proposed herein would respond to those developments by enhancing use of the 806-824 MHz and 851-869 MHz bands for Specialized Mobile Radio (SMR) systems.

2. *Objectives:* The Commission seeks to permit development of spectrally efficient wide-area SMR systems while continuing to allow entities that do not evolve into wide-area systems to acquire spectrum and remain viable. It also seeks to encourage more efficient use of spectrum in congested areas and to accommodate technologically advanced systems supporting enhanced services such as seamless wide-area roaming and clear data transmission.

3. *Legal Basis:* The legal basis for these rule changes is found in Sections 4(i), 302, 303(g), 303(r), and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 302, 303(g), 303(r), and 332(a).

4. *Reporting, Recordkeeping, and Other Compliance Requirements:* Applicants for Expanded Mobile Service Provider (EMSP) licenses must electronically file their EMSP license applications, and subsequent EMSP licensees must electronically file their applications for conditional authorizations for individual base station sites, using a particular computer-readable format, provided that the Commission has the capacity to accept information in such a format. The EMSP license applications must include the names of participants in the application; information regarding channels sought to be incorporated into the EMSP license; certification that the applicant will protect co-channel licensees and pending applications for co-channel facilities in the MTA/BTA from harmful interference; a construction schedule and cost estimates. EMSP licensees applying for conditional authorizations must include a list of all co-channel stations and previously filed co-channel applications in the area, including call signs and coordinates, and the stations' effective radiated power and antenna heights if co-channel spacing requirements are not met. In addition, EMSPs that do not have constructed and operational base stations in the relevant BTA/MTA must place into escrow sums equal to their reasonable estimates of costs of constructing their proposed EMSP systems, or obtain a performance bond in that amount. These licensees must demonstrate within five years after the license grant that they have constructed their EMSP channels so as to cover 80 percent of the geographic area or 80 percent of the population in the BTA/MTA, or any funds remaining in escrow that were not used for construction, or the amount of the performance bond, will be paid over to the U.S. Treasury.

5. *Federal Rules Which Overlap, Duplicate or Conflict with These Rules:* None.

6. *Description, Potential Impact, and Number of Small Entities Involved:* Many small entities, including SMR licensees, could be positively affected by this proposal because additional SMR service offerings and authorized service areas would be made available to them. The number of small entities that will be affected is unknown. In addition, expanded service opportunities will generate demand for new SMR equipment, benefiting equipment manufacturers. After evaluating comments in this proceeding, the Commission will further examine the impact of any rule changes on small entities and set forth our findings in the Final Regulatory Flexibility Analysis.

7. *Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives:* This *Notice* solicits comment on a variety of alternatives. All significant alternatives presented in response to the petitions for rule making have been addressed in this *Notice of Proposed Rule Making.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Central Virginia Educational Telecommunications Corporation against Prestige Cable TV, Inc.	CSR-3759
Request for Carriage	

MEMORANDUM OPINION AND ORDER

Adopted: May 28, 1993; Released: June 8, 1993

By the Chief, Mass Media Bureau:

1. On January 28, 1993, a petition on behalf of the Central Virginia Educational Telecommunications Corporation, licensee of Television Broadcast Station WNVC (Educ. Ch. 56), Fairfax, Virginia, was filed with the Commission claiming that Prestige Cable TV, Inc. ("Prestige") had declined to carry the station, even though the Grade B contour of WNVC encompasses the system's principal headend at Garrisonville, Virginia, and it is therefore a "local" signal within the meaning of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub., L. No. 102-385, 106 Stat. 1460 (1992).

2. Prestige filed an opposition to this petition on February 25, 1993, noting the outstanding *Standstill Order* and the pending litigation involving the constitutionality of the 1992 Cable Act in *Turner Broadcasting System, Inc. v. Federal Communications Commission*, Civil Action No. 92-2247 (D.D.C. December 4, 1992), and stating its belief that the court might invalidate the Act, but that if not, Prestige already carries the following noncommercial stations, which may substantially duplicate WNVC's programming: WETA-TV (Educ., Channel 26), Washington, DC.; WHMM (Educ., Channel 32), Washington, DC; and WNVT (Educ., Channel 53), Goldvein, Virginia. Therefore, Prestige sought an extension of time until May 13, 1993, to evaluate the programming schedules of the above stations in light of the Commission's *Report and Order in MM Docket No. 92-259*, FCC 93-144, FCC Rcd (1993), in order to determine whether or not it should further supplement its initial opposition.

3. On April 8, 1993, the United States District Court of the District of Columbia issued a decision in the litigation involving *Turner Broadcasting System, Inc., supra*, which upheld the provisions of the 1992 Cable Act rights and terminated the 120 day *Standstill Order* previously issued in this case.

4. Given the passage of time, and having received no additional pleadings in this matter by May 13, 1993, from Prestige substantiating its initial supposition of potential program duplication by WNVC, the petition filed January 28, 1993, by the Central Virginia Educational Telecommunications Corporation IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Prestige Cable TV, Inc. IS ORDERED to commence carriage of WNVC, forty-six (46) days from the date of this *Order* on its cable television system serving Stafford County, Virginia. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

Roy J. Stewart
Chief, Mass Media Bureau

In re:

Complaint of Alpha-Omega Broadcasting of Albuquerque, Inc. against Multimedia Development Corp.	CSR-3750 NM0168

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: May 28, 1993; Released: June 8, 1993

By the Chief, Mass Media Bureau:

1. On January 28, 1993, a complaint was filed with the Commission on behalf of Alpha-Omega Broadcasting of Albuquerque, Inc., licensee of Television Broadcast Station KAZQ (Educ., Channel 32), Albuquerque, New Mexico. According to KAZQ, the station is entitled to carriage by cable television systems serving the following New Mexico communities, all of which are owned by Multimedia Development Corp., d/b/a Sierra Cablevision, because KAZQ is within fifty miles of the principal headend of the cable system serving each of them, and therefore KAZQ is a "local" signal for each of these areas within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992): Bernalillo, Edgewood, Estancia, Isleta Pueblo, Moriarty, Sandia Knolls, and Tijeras.

2. On April 8, 1993, the United States District Court of the District of Columbia issued a decision in the litigation involving *Turner Broadcasting System, Inc., et al. v. Federal Communications Commission*, Civil Action No. 92-2247 (D.D.C. April 8, 1993), which upheld the provisions of the 1992 Cable Act that had been challenged as violating plaintiffs' constitutional rights and terminated the 120 day *Standstill Order* previously issued in this case.

3. Since no other pleadings were filed in this matter within the fifteen (15) day period specified by the Commission in its Public Notice, Mimeo No. 32419 (released March 26, 1993), the complaint filed January 28, 1993, by Alpha-Omega Broadcasting of Albuquerque, Inc. IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Multimedia Development Corp. d/b/a Sierra Cablevision IS ORDERED to commence carriage of Station KAZQ, Channel 32, Albuquerque, New Mexico on its cable television systems in Bernalillo, Edgewood, Estancia, Isleta Pueblo, Moriarty, Sandia Knolls and Tijeras, New Mexico forty-six (46) days from the date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of the Mississippi	CSR-3745
Authority for Educational	TN0063
Television against Time	
Warner Cable	

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: May 28, 1993; Released: June 8, 1993

By the Chief, Mass Media Bureau:

1. On January 19, 1993, the above petition on behalf of the Mississippi Authority for Educational Television, licensee of Station WMAV-TV (Educ., Channel 18), Oxford, Mississippi was filed with the Commission. An opposition to this petition was filed March 3, 1993, on behalf of Time Warner Cable, a division of Timer Warner Entertainment L.P., on behalf of its Memphis CATV, Inc., Memphis, Tennessee division ("Memphis"). On March 23, 1993, Station WMAV-TV filed its reply to Memphis' opposition.

2. In its original petition, WMAV-TV stated that its reference point was within fifty miles of Memphis' principal headend, and that it was entitled to carriage by the cable television which generally serves Southaven, Mississippi, and other areas of northwest Mississippi, pursuant to §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

3. In response, however, Memphis, cites the *Standstill Order* and the associated litigation involving the constitutionality of the 1992 Cable Act at issue in *Turner Broadcasting System, Inc. et al. v. Federal Communications Commission*, Civil Action No. 92-2247 (D.D.C., December 4, 1992), stating that the system may decline to carry WMAV-TV and noting that the station's reference point is more than fifty miles from Memphis' principal headend, which is also outside the station's Grade B contour. Memphis adds that it already carries Station WKNO-TV (Educ., Channel 10), Memphis, Tennessee, and argues that carriage of another Mississippi educational station is not in the best interest of its Tennessee subscribers. Memphis also challenges the status of WMAV-TV as a NCE station, as defined by 47 U.S.C. §531(1)(2).

4. In reply, WMAV-TV notes that Memphis presently carries it in selected areas, and that the station wishes to assure its carriage in the future and in other northwestern Mississippi communities as the system expands. WMAV-TV adds that it hired a consulting engineer, Keith G. Blanton, who prepared a map showing the station's predicted Grade A and Grade B contours. Although WMAV-TV admits that Memphis' principal headend is 1.529 miles beyond the fifty mile limit of 47 U.S.C. §531(1)(2)(A), and that its Grade B contour falls slightly short of encompassing Memphis' designated headend, the station argues that an "hypertechnical" application of the rule would be grossly unfair and inequitable to the citizens and schools it is committed to serve in northwestern Mississippi.

5. On April 8, 1993, the United States District Court of the District of Columbia issued a decision in *Turner, supra,* upholding the provisions of the 1992 Cable Act that had been challenged as violating plaintiffs' constitutional rights and terminating the *Standstill Order* previously issued in that proceeding. However, this decision did not amend the mandatory carriage requirements previously established in the 1992 Cable Act, nor can the Commission, which is merely charged with its interpretation and implementation.

6. Therefore, since all parties agree that Memphis' principal headend is more than fifty miles from the reference point of WMAV-TV's principal community and beyond the station's Grade B contour, the 1992 Cable Act does not entitle the station to mandatory carriage on the Memphis cable television system, and the petition filed January 19, 1993, by the Mississippi Authority for Educational Television IS DISMISSED, pursuant to §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 28, 1993

COMMENTS INVITED ON IDAHO PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for Idaho (Region 12).

In accordance with the Commission's Memorandum Opinion and Order in General Docket 87-112, Region 12 consists of the state of Idaho. (General Docket No. 87-112, 3 FCC Rcd 2113 (1988)).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, interested parties may file comments on or before **July 7, 1993** and reply comments on or before **July 22, 1993.** (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **PR Docket 93-149 Idaho-Public Safety Region 12.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 28, 1993

COMMENTS INVITED ON NORTH CAROLINA PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for North Carolina (Region 31).

In accordance with the Commission's Memorandum Opinion and Order in General Docket 87-112, Region 31 consists of the state of North Carolina. (General Docket No. 87-112, 3 FCC Rcd 2113 (1988)).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, interested parties may file comments on or before **July 7, 1993** and reply comments on or before **July 22, 1993.** (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **PR Docket 93-150 North Carolina-Public Safety Region 31.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 89-553

In the Matter of
Amendment of Parts 2 and 90 of the
Commission's Rules to Provide for the
Use of 200 Channels Outside the
Designated Filing Areas in the
896-901 MHz and 935-940 MHz Bands
Allotted to the Specialized
Mobile Radio Pool

Modification of FCC Rule Section 90.627(b) Governing Multiple Sites for Specialized Mobile Radio Service Systems In Rural Markets — RM-6724

ORDER

Adopted: May 27, 1993; **Released: May 28, 1993**

By the Commission:

1. By this Order we are suspending enforcement of Section 90.631(f) of our Rules, 47 C.F.R. § 90.631(f), as revised on January 14, 1993.[1] We are suspending enforcement of the revised Section 90.631(f) pending our disposition of an April 2, 1993, petition for reconsideration (petition) filed by the American Mobile Telecommunications Association, Inc. (AMTA).[2]

2. The revised Section 90.631(f) provides that Specialized Mobile Radio (SMR) licenses cancel automatically if a licensee discontinues station operations for more than sixty consecutive days, unless the Commission authorizes additional time for station operations to remain discontinued. If the Commission does not authorize additional time, the subject license cancels automatically unless the station resumes operations within five days after the licensee receives the Commission's letter declining to authorize additional time.

3. AMTA requests that we either stay the effective date of the revised rule or decline to enforce Section 90.631(f) as revised until we rule on the petition. According to AMTA, application of the revised Section 90.631(f) would cause a severe hardship to licensees of previously constructed (but no longer constructed) SMR stations by cancelling their licenses for failure to reconstruct stations and resume operations within five days of receiving the Commission's denial letter.[3] AMTA alleges that we did not intend this harsh result because our policies against warehousing channels are not furthered by cancelling licenses for previously constructed stations.[4] AMTA also claims that such license cancellation could be irremediable because where waiting list procedures apply a subject licensee would not have the opportunity to reapply for the recovered channels before the channels are assigned to another licensee.[5]

4. We agree with AMTA that should we ultimately modify Section 90.631(f) to allow for a longer reconstruction period, some licensees could be irreparably harmed by application of the revised rule prior to our action on reconsideration.[6] We are, therefore, suspending enforcement of revised Section 90.631(f). In light of our action herein, we will return without action any pending requests filed pursuant to revised Section 90.631(f).

5. We prepared a Final Regulatory Flexibility Analysis for the *First Report and Order*. Our action suspending enforcement of the revised Section 90.631(f) will not materially modify the effect that the instant proceeding has on small businesses.

6. Accordingly, IT IS ORDERED that enforcement of the revision to Section 90.631(f) adopted in the *First Report and Order and Further Notice of Proposed Rule Making*, PR Docket No. 89-553, IS SUSPENDED, effective upon publication of the instant Order in the Federal Register, until further order of the Commission.[7]

7. Additionally, IT IS ORDERED that the April 2, 1993, Request for Stay filed by the American Mobile Telecommunications Association, Inc. is GRANTED to the extent indicated herein.

8. For further information concerning this Order contact Peter Daronco, Rules Branch, Land Mobile and Microwave Division, Private Radio Bureau, (202) 632-6497.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[1] See *First Report and Order and Further Notice of Proposed Rule Making*, PR Docket No. 89-553, 8 FCC Rcd 1469 (1993).

[2] AMTA filed concurrently the instant request for stay. AMTA is a nationwide, non-profit trade association representing the interests of the SMR industry. AMTA request for stay at 1.

[3] AMTA notes that the licensee of a constructed station will have already invested a considerable amount of money in trunked SMR equipment and that a significant percentage of requests for temporary discontinuance are likely to be merely for the purpose of changing station location. If, however, the Commission denies the request for additional time, AMTA argues, an affected licensee would not be able to obtain even Special Temporary Authority to relocate within the prescribed five-day period. AMTA request for stay at 6 and n.6.

[4] AMTA request for stay at 4-5.

[5] AMTA request for stay at 5 and n.5.

[6] In its petition, AMTA specifically proposes that we allow a licensee more than five days to reconstruct its station and resume operations if we deny its request for additional time.

[7] We clarify that we are suspending enforcement of the last four sentences of revised Section 90.631(f) and that Section 90.157 of our Rules, 47 C.F.R. § 90.157, still applies to SMR stations.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 92-210

In the Matter of

Amendment of Part 90 of the Commission's Rules Governing Extended Implementation Periods — RM-7974

REPORT AND ORDER

Adopted: May 13, 1993; Released: June 9, 1993

By the Commission:

I. INTRODUCTION

1. On October 13, 1992, we released a *Notice of Proposed Rule Making* (*Notice*) in PR Docket No. 92-210, 7 FCC Rcd 6587 (1992), proposing to amend our slow-growth construction requirements for private land mobile radio licensees. In this *Report and Order,* we amend 47 C.F.R. § 90.629 to lengthen the maximum extended implementation period from three to five years; to eliminate the fleet-size requirement for qualification for extended implementation; to eliminate the annual reporting requirement; to permit all applicants that might be required by law to follow a multi-year cycle for planning, approval, funding and purchasing a proposed system to be eligible for extended implementation; and to extend the applicability of 47 C.F.R. § 90.629 to Specialized Mobile Radio (SMR) Category applicants.

II. BACKGROUND

2. In the private land mobile radio services, licensees are ordinarily required to have conventional systems constructed and placed in operation within eight months of licensing, and trunked systems constructed and placed in operation within one year of licensing, or their licenses will cancel automatically.[1] Pursuant to Section 90.629, however, applicants for frequencies in the Public Safety, Industrial/Land Transportation, Business, and General Category pools may, upon the proper showing, be given an extended period of time for constructing and placing a station in operation.

3. Section 90.629 allows a three-year implementation period for applicants able to make one or more of the following showings: (1) the proposed system will serve a large fleet of at least 200 mobile units and will involve a multi-year cycle for planning, approval, funding, purchase and construction; (2) the proposed system will require longer than eight months to place into operation because of its purpose, size, or complexity; (3) the proposed system is to be a part of a coordinated or integrated area-wide system that will require more than a year to plan, approve, fund, and construct; or (4) the applicant is a local governmental agency and demonstrates that it is required by law to follow a multi-year cycle for the planning, approval, funding and purchasing of the proposed system.[2]

4. The *Notice* solicited comment on a proposal to amend Section 90.629 of our Rules, 47 C.F.R. § 90.629, by (1) extending the rule's applicability to Specialized Mobile Radio (SMR) Category applicants, (2) lengthening the "slow growth" period from three to five years, (3) eliminating the fleet-size requirement for qualification for an extended implementation period, and (4) eliminating the requirement that licensees provide us with an annual report on the status of their system implementation. Eleven commenters filed comments in this proceeding; four filed reply comments.[3]

III. DISCUSSION

5. In the *Notice,* we observed that an increasing number of SMR applicants have expressed interest in operating technically innovative, wide-area systems.[4] We noted that because of the expense and complexity of these systems, licensees are frequently not able to construct and place them in operation within the one-year time frame applicable to trunked SMRs.[5] To fully implement their systems, SMR applicants are therefore often in need of an extended implementation period. We continue to believe that applicants for SMR Category channels have as great a need for extended implementation authority as applicants for frequencies in the categories currently identified in Section 90.629. We therefore will include applicants for SMR Category channels among those that are eligible for extended implementation authority.[6]

6. We will also lengthen the maximum extended im-

---

[1] *See* 47 C.F.R. § 90.633(c), 47 C.F.R. §§ 90.631(e) and (f), 47 C.F.R. § 90.633(d) (conventional); 47 C.F.R. §§ 90.631(e) and (f) (trunked).

[2] 47 C.F.R. § 90.629(a)(1)-(4).

[3] Comments were filed by American Mobile Telecommunications Association (AMTA); Associated Public-Safety Communications Officers, Inc. (APCO); Council of Independent Communication Suppliers (CICS); Delmarva Power Co. (Delmarva); EDS Corporation (EDS), a subsidiary of General Motors Corporation and General Motors Research Corporation; Fleet Call, Inc. (Fleet Call); National Association of Business and Education Radio, Inc. (NABER); PowerSpectrum, Inc. (PSI), a subsidiary of Geotek Industries, Inc.; Southern California Gas Company (SCG); Texas Utilities Electric Company (TU Electric); Utilities Telecommunications Council (UTC). Reply comments were filed by Ameritech Operating Companies (Ameritech); Consumers Power Company (Consumers) EDS, and NABER.

[4] *See* Fleet Call, Inc., 6 FCC Rcd 1533 (1991); American Mobile Data Communications, Inc., 4 FCC Rcd 3802 (1989).

[5] *E.g.,* Fleet Call *supra* at 1536.

[6] There are three petitions currently before us seeking modification of our rules that govern the licensing of SMR systems. *See* RM-8029, (asking the Commission to facilitate licensing of wide-area systems), filed March 13, 1992 by the National Association of Business and Education Radio, Inc.; RM-8030 (asking the Commission to modify the so-called "40-mile rule," 47 C.F.R. § 90.627(b)), filed May 26, 1992 by A&B Electronics, Inc.;

plementation construction period from three to five years.[7] It is evident, based on the record in this proceeding, that many types of private land mobile radio applicants are required to develop and implement radio systems over extended periods of time. It has always been our practice to cooperate with these applicants, many of which serve the public welfare and are required by state law to follow multi-year planning and funding cycles, to assure that they have the frequencies and time available to implement their radio systems. There is, however, competition for available spectrum. Therefore, the extended implementation period should not be so long that frequencies remain warehoused or unused. We believe that a maximum five-year implementation period, coupled with reasonable construction benchmarks, is sufficient to enable licensees to plan and construct their systems and, at the same time, to ensure that scarce spectrum is used.

7. We see no continuing need, however, to require that the applicant serve at least 200 mobile units.[8] There is little correlation between the number of mobile units operating on an applicant's system and that applicant's need for extended implementation. None of the commenters who addressed this issue opposed eliminating the 200-mobile fleet size requirement.[9] Accordingly, we are modifying Section 90.629 to eliminate the requirement that slow-growth applicants serve at least 200 mobile units.

8. Furthermore, our rules currently provide that applicants requesting extended implementation authority because they are required by law to follow a multi-year cycle for the planning, approval, funding and purchasing of a system must be local government agencies in order to qualify for such authority. We believe that the need for extended implementation exists for all agencies and organizations that are subject to these requirements, not merely local government agencies. Therefore, we will permit *any* entity required by law to follow a multi-year cycle for the planning, approval, funding and purchasing of a system to be eligible for extended implementation.[10]

9. The *Notice* further proposed to abolish the current requirement that a licensee granted extended implementation submit annual reports to the Commission showing its progress toward completing its system. Twelve commenters supported abolishing the annual reporting requirement;[11] two commenters opposed eliminating the annual reporting process for extended implementation systems.[12] We agree with these latter commenters that it is important for licensees operating pursuant to slow-growth implementation plans to demonstrate compliance with their commitments. We see no need, however, to require slow-growth licensees to file detailed reports showing the extent to which the authorized system has been implemented. These reports generally contain more detail than is necessary to assure compliance with their implementation plans and, ultimately, impose another administrative burden on our already taxed licensing staff. We believe it will be sufficient to require slow-growth licensees to certify annually that they are in compliance with their extended implementation commitments.

10. Accordingly, we are modifying Section 90.629 to require slow-growth applicants to certify annually during their extended implementation period that they are in compliance with their commitments. It is the licensee's obligation to fulfill its commitments and to notify this agency when it expects to deviate from its implementation plans.[13] Once granted a license pursuant to our slow-growth rules, a licensee must assure that progress is being made in accordance with its representations including, but not limited to, the securing of necessary funding and constructing and placing the system in operation. If a licensee fails to meet its commitments, and has failed to obtain approval for its deviations, we will terminate the licensee's extended implementation authority. The licensee, in such cases, will be given six months to complete construction of its system. At the end of this six-month period, authorizations for all stations not constructed and placed in operation will be cancelled and the frequencies will be made available for reassignment.

---

and RM-8117 (proposing a wide-area SMR licensing program), filed October 26, 1992 by the American Mobile Telecommunications Association, Inc. As part of a future rule making proceeding addressing these petitions, we may revisit and possibly modify our decision to extend "slow growth" authority to SMR Category applicants.

[7] Various commenters supported lengthening the "slow growth" period for applicants from three to five years. *See, e.g.*, CICS comments at ii, 7-8, NABER Reply Comments at ii, EDS Comments at 2, PSI Comments at 5, SCG Comments at 1-2, Ameritech Reply Comments at 2. UTC requested that non-commercial applicants be granted up to ten years to construct and operate a large system. UTC Comments at 5-6. Two commenters, AMTA and APCO, opposed the proposed rule change. AMTA expressed general reservations about such extensions. APCO was concerned that spectrum misuse would result if slow growth authority were extended to non-public safety entities licensed in the Public Safety Pool. AMTA Comments at 7. APCO Comments at 2-4. Consumers' challenged APCO's concerns regarding potential spectrum misuse from allowing non-public safety entities from incorporating Public Safety channels into their slow growth systems because APCO had not made any showing of the misuse it anticipates. Consumers' Reply Comments at 8.

[8] 7 FCC Rcd at 6587. This action is taken pursuant to a proposal offered by UTC in its petition for rule making (RM-7974).

[9] CISC Comments at ii, 8-9, EDS Comments at 2-3, PSI Comments at 6 n.6, SCE Comments at 6, TU Electric Comments at 5-6, UTC Comments at 7-8, Ameritech Reply Comments at 2, NABER Comments at 7.

[10] This action, too, is in response to a proposal put forth by UTC in its petition for rule making. It will enable -- in addition to local governmental entities -- licensees, such as utilities, to be eligible for extended implementation.

[11] PSI Comments at 5, UTC Comments at 8, Ameritech Reply Comments at 2, SCG Comments at 2, SCE Comments at 6, SCE Reply Comments at 2, Delmarva Comments at 6, EMS Comments at 3, CICS Comments at 12, NABER Reply Comments at 10-11.

[12] APCO opposes elimination of the annual reporting process for slow growth licensees, arguing that this is the only method for determining whether a licensee has a legitimate need for extended implementation or is warehousing frequencies. APCO Comments at 5. In a similar vein, AMTA questions how the Commission will monitor and enforce construction benchmarks without annual reporting requirements. AMTA Comments at 7-8. These concerns are addressed in paragraph 10, *infra*.

[13] Licensees may, of course, amend their initial commitments. Such amendments should be filed when it becomes apparent that funding is not forthcoming as planned or when other factors are preventing implementation as initially proposed. In any event, requests to amend implementation plans should be filed annually with the licensee's certification statement.

11. To obtain an extended implementation period, an applicant currently must file a statement justifying the amount of time needed to construct and place its radio system in operation.[14] We shall continue this requirement. An applicant requesting extended implementation authority should include in its supporting statement: (1) a description of the proposed system; (2) the amount of time necessary to construct and place the system in operation; (3) identification of the number of base stations to be constructed and placed in operation during each year of the extended construction period; (4) a showing that the applicant satisfies at least one of the three conditions for qualification for extended implementation as set forth in Section 90.629(a)(1), (2) and (3); and, (5) whether the applicant has obtained funding approval for constructing the proposed system and if not, when such funding approval is expected to be obtained, if the applicant is required by law to follow a multi-year planning and funding cycle.

12. Based on each applicant's statement of justification, we will determine whether slow-growth authority should be granted and, if so, what the licensee's implementation period should be. Our slow-growth rules, however, are not intended to be used as a mechanism to warehouse spectrum. We intend, therefore, to scrutinize all slow-growth requests closely, especially those filed by applicants who have yet to obtain necessary funding to construct their systems or who are applying for SMR Category channels. Our purpose is to ensure that such applicants have demonstrated a need for extended implementation and that the channels will be placed in operation within a reasonable period of time.

13. Our construction rules are the only mechanism that we currently have to assure that spectrum is placed in operation within the prescribed periods of time by those granted licenses. Spectrum for the private land mobile radio services is scarce, and we do not intend to allow channels to remain encumbered under the protection of our slow-growth rules. We expect all applicants that apply under slow-growth rules to be diligent in providing justification for extended implementation and reasonable benchmarks for constructing and placing their systems in operation. We will expect SMR applicants to be especially diligent in providing this information. To further ensure that SMR Category spectrum is properly put to use, we will reserve the right, at any time prior to the expiration of the extended implementation period, to request information from the SMR Category licensee regarding the licensee's progress toward completing its system.

14. Additionally, we will apply the Finder's Preference Program[15] to licensees authorized under extended implementation to the same extent as to other authorizations,[16] *i.e.*, by permitting "finders" to identify and acquire channels not constructed and placed in operation only at the *end* of the extended implementation period and after the Commission has followed its normal channel recovery procedures.[17]

15. Finally, the *Notice* proposed to clarify Section 90.629(b) to indicate that licensees of trunked systems authorized an extended implementation period are required to load their systems to the same level (70 mobiles per channel within 5 years of authorization) as those licensees of trunked systems not authorized an extended implementation period. (*See* Section 90.631(b)). We clarify Sections 90.629 and 90.631(b) accordingly.

IV. CONCLUSION

16. By this action, we modify our rules relating to extended implementation to expand licensee eligibility for extended implementation, increases the maximum allowable time period for extended implementation, and eliminates unnecessary filing burdens on licensees.

V. FINAL REGULATORY FLEXIBILITY ANALYSIS

17. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rule making proceeding because the adopted rule amendments will not have a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. No comments were received addressing this certification in the Initial Regulatory Flexibility Analysis contained in the Notice of Proposed Rule Making in this proceeding.

VI. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i), 303(r) and 332(a)(2) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 332(a), Sections 90.629 and 90.631 of the Commission's Rules, 47 C.F.R. §§ 90.629 and 90.631, ARE AMENDED as set forth in the Appendix below, effective [sixty days after publication in the Federal Register].

19. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

20. For further information concerning this *Report and Order*, contact Tatsu Kondo, Land Mobile and Microwave Division, Private Radio Bureau, (202) 632-7125.

---

[14] 47 C.F.R. § 90.629(a).

[15] 47 C.F.R. §§ 90.173(k), 90.175(f)(15), 90.611(d), and 90.631(f).

[16] Several commenters requested clarification about the applicability of the Finder's Preference Program to extended implementation authorizations. *See* NABER Comments at 8-10, Consumers' Reply Comments at 4-5.

[17] As indicated in paragraph 62 of the *Report and Order* that established the Finder's Preference Program, 6 FCC Rcd 7297, 7307 (1991), a finder may not file a preference request for the channels of a licensee that has failed to construct and place its system in operation until 180 days after the deadline has passed for that licensee to construct and place its station in operation. During this 180-day time period, we conduct our review of the licensee's compliance with our construction requirements and cancel the licensee's station authorization if a violation is uncovered. Individuals wishing to file a finder's preference request with regard to the channels of a licensee granted extended implementation, therefore, may file such request no sooner than 1) 180 days after the original extended implementation period has expired or 2) 180 days after expiration of the six-month "grace" period for constructing and placing a system in operation granted to the licensee whose extended implementation period was prematurely terminated by the Commission (*see* para 10, *supra*).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 90 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

Part 90 - Private land mobile radio services

1. The authority citation to Part 90 continues to read as follows:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, and 332 unless otherwise noted.

2. Section 90.629 is revised to read as follows:

§ 90.629 Extended implementation period.

Applicants requesting frequencies for either trunked or conventional operations may be authorized a period of up to five (5) years for constructing and placing a system in operation in accordance with the following:

(a) The applicant must justify an extended implementation period. The justification must describe the proposed system, state the amount of time necessary to construct and place the system in operation, identify the number of base stations to be constructed and placed in operation during each year of the extended construction period, and show that:

(1) The proposed system will require longer than eight months (if a conventional system) or one year (if a trunked system) to construct and place in operation because of its purpose, size, or complexity; or

(2) The proposed system is to be part of a coordinated or integrated wide-area system which will require more than eight months (if a conventional system) or one year (if a trunked system) to plan, approve, fund, purchase, construct, and place in operation; or

(3) The applicant is required by law to follow a multi-year cycle for planning, approval, funding, and purchasing the proposed system.

(b) Where an applicant is required by law to follow a multi-year cycle for planning, approval, funding and purchasing a proposed system, the applicant must indicate whether funding approval has been obtained and if not, when such funding approval is expected.

(c) Authorizations under this Section are conditioned upon the licensee constructing and placing its system in operation within the authorized implementation period and in accordance with an approved implementation plan of up to five years. Licensees must certify annually that they are in compliance with their yearly station construction commitments, but may request amendment to these commitments at the time they file their annual certification. If the Commission approves the requested amendments to a licensee's implementation commitments, the licensee's extended implementation authority will remain in effect. If, however, the Commission concludes, at this or any other time, that a licensee has failed to meet its commitments, the Commission will terminate authority for the extended implementation period. When the Commission terminates an extended implementation authority, the affected licensee will be given six months from the date of termination to complete system construction. At the end of any licensee's extended implementation period, authorizations for all stations not constructed and placed in operation will be cancelled. Trunked systems granted an extended implementation period must comply with the channel loading requirements of Section 90.631(b). Conventional channels not loaded to 70 mobile units may be subject to shared use by the addition of other licensees.

(d) Applicants eligible in the Industrial/Land Transportation Category requesting authorizations under this section may request frequencies in the Business Category only if the application contains a statement that no frequencies in the Industrial/Land Transportation Category are available for assignment in their geographic area.

3. Section 90.631 is amended by revising paragraph (b) to read as follows:

§ 90.631 Trunked systems loading, construction and authorization requirements.

* * * * *

(b) Each applicant for a trunked system shall certify that a minimum of 70 mobiles for each channel authorized will be placed in operation within five years of the initial license grant. Except as provided in paragraph (i) of this section, if at the end of five years a trunked system is not loaded to the prescribed levels and all channels in the licensee's category are assigned in the system's geographic area, authorization for trunked channels not loaded to 70 mobile stations cancels automatically at a rate that allows the licensee to retain one channel for every 100 mobiles loaded, plus one additional channel. If a trunked system has channels from more than one category, General Category channels are the first channels considered to cancel automatically. All licensees who are authorized initially before June 1, 1993, and are within their original license term or are within the term of a two-year authorization granted in accordance with paragraph (i) of this section are subject to this condition. A licensee that has authorized channels cancelled due to failure to meet the above loading requirements will not be authorized to obtain additional channels to expand that same system for a period of six months from the date of cancellation.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-66

In the Matter of

Amendment of Part 90
Concerning Secondary
Fixed Operations in
the 450-470 MHz Band

MEMORANDUM OPINION AND ORDER

Adopted: May 13, 1993; Released: June 9, 1993

By the Commission:

I. INTRODUCTION

1. On June 5, 1992, we adopted a *Report and Order*[1] concerning the secondary fixed use of frequencies in the 450-470 MHz band.[2] Two petitions requesting partial reconsideration of our decisions in the *Report and Order* were received.[3] This *Memorandum Opinion and Order* clarifies our decision concerning frequency coordination procedures and addresses the issue of secondary fixed use in urban areas.

II. BACKGROUND

2. Section 90.261 of the Rules governs the use of certain 450-470 MHz frequencies for fixed operations on a secondary basis to base/mobile operations. In the *Report and Order* we amended Section 90.261 to (a) permit all Part 90 eligibles (with the exception of Business Radio Service eligibles) to use all designated 450-470 MHz frequencies for secondary fixed use; (b) limit the availability of Business Radio Service frequencies for secondary fixed use to Business Radio Service eligibles; (c) allow the coordination of secondary fixed applications to be made by either the applicant's "home" coordinator or by another certified frequency coordinator (with notification to all "primary" coordinators if a frequency other than a frequency for which the applicant is eligible on a primary basis is recommended);[4] (d) reduce the maximum transmitter output power to 75 watts for non-urban secondary fixed stations and; (e) permit secondary fixed stations to operate in previously restricted urban areas at 20 watts. This action provided applicants with additional flexibility to meet their diverse communications requirements, and established simpler and less costly coordination procedures for applicants requesting secondary fixed radio use.

III. DISCUSSION

Coordinator Notification

3. FIT and MRFAC have asked us to reconsider the decision in our *Report and Order* concerning the coordinator notification procedures applicable to secondary fixed operations. FIT requests that we require a home coordinator that recommends a frequency allocated to the applicant's own radio service to notify all other coordinators certified to recommend that frequency on a primary basis for mobile operations.[5] MRFAC requests clarification of the circumstances under which coordinators processing applications for secondary fixed use of mobile frequencies must provide notification to other affected coordinators before submitting such applications to the Commission.[6] UTC, in its Comments, also requests clarification of this issue.[7]

4. The *Report and Order* simplified the coordination requirements for applicants requesting secondary fixed use of the 450-470 MHz mobile frequencies. Specifically, it replaced the requirement for multiple coordinations for applicants for frequencies shared by more than one radio service with a simpler "notification" requirement. The revised Section 90.261(e) reads in part:

> ". . . If a coordinator recommends a frequency allocated to a service where the applicant *is not eligible* on a primary basis, then the coordinator *must notify* all coordinators certified to recommend that frequency on a primary basis before submitting the application to the Commission. . . ." (Emphasis added)

The comments indicate that this wording can be interpreted to mean that for shared frequencies, when a home coordinator recommends a frequency allocated to a service where the applicant *is eligible* on a primary basis, the home coordinator *is not required* to notify the other primary coordinators of that frequency recommendation. Our intent in the *Report and Order* was to require a home coordinator to notify all primary coordinators when making a recommendation for secondary use of a shared fre-

---

[1] Report and Order (*Report and Order*), PR Docket No. 91-66, 7 FCC Rcd 3498 (1992).

[2] Secondary fixed use is the point-to-point or fixed use of a base/mobile frequency on a non-interference basis to base/mobile operations and is governed by Section 90.261 of the Rules, 47 C.F.R. § 90.261.

[3] Petition for Partial Reconsideration filed by Forest Industries Telecommunications (FIT) on July 13, 1992, and Petition for Limited Reconsideration filed by the Manufacturers Radio Frequency Advisory Committee (MRFAC) on July 13, 1992. Comments on these petitions were filed by the Utilities Communications Council (UTC) on September 11, 1992. Reply comments were filed by FIT. In addition, the Special Industrial Radio Service Association (SIRSA), in a letter dated July 2, 1992, to Richard J. Shiben, Chief, Land Mobile and Microwave Division, outlined their interpretation of the new rules and indicated the procedures they would follow for secondary fixed use applications.

[4] For purposes of this discussion, we define a home coordinator as the coordinator for the radio service in which the applicant is eligible and a primary coordinator as a coordinator of the frequency that the applicant seeks to use for secondary fixed use. When primary base/mobile frequencies are shared by several radio services, there will be several primary coordinators.

[5] FIT Petition at 3.

[6] MRFAC Petition at 1.

[7] UTC Comments on Petitions for Reconsideration at 3.

quency. We agree with the petitioners and comments that there is ambiguity in the current wording of Section 90.261(e) as adopted. We, therefore, amend Section 90.261(e) to indicate that, when frequencies are shared, notification by the home coordinator of its recommendation must be provided to all primary coordinators of the shared frequency.

5. If there is an objection to a coordinator's recommendation, the objecting coordinator must inform the coordinator making the recommendation of its objection within 10 working days after notification.[8] The recommending coordinator should attempt to resolve any objections before submitting an application to the Commission and should under no circumstances submit an application to the Commission prior to the expiration of the 10-day period.

6. We note further that all notified coordinators will be expected to indicate the licensing of secondary fixed stations in their respective data bases.[9] The substitution of a notification requirement for the previously existing interservice coordination procedure does not change a coordinator's obligation to maintain an accurate data base of primary and secondary assignments. A notified coordinator may not pass on an additional fee to the applicant, either directly or through the recommending coordinator, in connection with its examination of the application or the placement of the information in its data base.

Secondary Fixed Use in Urban Areas

7. In its petition, FIT also requests that we reconsider our decision to permit secondary fixed use in urban areas.[10] FIT states that it believes that the decision to allow fixed operations in urban areas is highly undesirable because of frequency congestion in the 450-470 MHz band, claiming that interference will increase and that it will be difficult to introduce new technologies in the band.[11] FIT cites our *Notice of Inquiry*, PR Docket No. 91-170, in which the existence of urban frequency congestion is documented. UTC, in its comments, opposes FIT's proposal.

8. We are aware of the frequency congestion in urban areas. We recognized this fact in the *Report and Order* where we stated that because of frequency congestion due to heavy base/mobile use of the 450-470 MHz frequencies, few secondary fixed stations are likely to be coordinated in urban areas.[12] We indicated therein that permitting urban use at 20 watts transmitter power could potentially permit *some* secondary fixed use in previously restricted areas. As UTC points out, our rule changes do not "encourage" applicants to install secondary fixed systems in urban areas. Coordinators and applicants are aware of urban frequency congestion, the secondary status of fixed operations, and the potential impact on such operations due to possible future rule changes.[13]

9. FIT's proposal would totally prohibit the use of secondary fixed operations in 40 urbanized areas with 600,000 or more population, as listed in the 1970 Census. Such a denial could prohibit many potential secondary fixed stations that could be implemented without causing interference or adding to frequency congestion. We, therefore, reaffirm our decision in the *Report and Order* to permit coordinated secondary fixed use in urban areas and deny that portion of the FIT petition requesting reconsideration of that decision.

IV. CONCLUSION

10. The rules we adopted in the *Report and Order* made frequencies in the 450-470 MHz band available for secondary fixed use in both urban and non-urban areas to a greater number of Part 90 eligibles and simplified the coordination procedures. The clarifications and decisions made herein remove ambiguity in interpretation of those rules and establish specific procedures for coordinators to follow when making secondary fixed use recommendations.

V. REGULATORY FLEXIBILITY ANALYSIS

11. A Final Regulatory Flexibility Analysis was prepared for the *Report and Order* in this proceeding. None of the rules adopted in this *Memorandum Opinion and Order* modify the effect this proceeding has on small businesses and it is, therefore, unnecessary for us to modify our Final Regulatory Flexibility Analysis.

VI. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that the Petition for Partial Reconsideration filed by Forest Industries Telecommunications and the Petition for Limited Reconsideration filed by the Manufacturers Radio Frequency Advisory Committee, Inc. are GRANTED to the extent indicated herein and are otherwise DENIED.

13. IT IS FURTHER ORDERED that pursuant to the authority of Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), Part 90 of the Commission's Rules, 47 C.F.R. Part 90, IS AMENDED as set forth in the Appendix below, effective thirty days after publication in the Federal Register.

14. For further information regarding this *Memorandum Opinion and Order* contact Eugene Thomson, Private Radio Bureau, Rules Branch, (202) 634-2443.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

---

[8] The method of notification and objection (E-mail, facsimile, etc.) will be left to the coordinators' discretion and the calculation of time will be in accordance with Section 1.4 of the Rules.

[9] UTC Comments at 4 and 5. UTC points out potential problems should coordinators refuse to enter notifications into their data bases.

[10] The *Report and Order* permitted secondary fixed operations with a maximum transmitter output power of 75 watts for stations 140 km (87 mi) or more, and 20 watts for stations less than 140 km (87 mi) from the centers of urbanized areas of 600,000 or more population (1970 Census).

[11] FIT Petition at 2.

[12] *Report and Order* at paragraph 18.

[13] UTC Comments at 7.

APPENDIX

Part 90 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 90 - Private land mobile radio services

1. The authority citation for Part 90 continues to read:

AUTHORITY: Sections 4, 303, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. § 154, 303, and 332, unless otherwise noted.

2. Section 90.261 is amended by revising paragraph (e) to read as follows:

§ 90.261 Assignment and use of the frequencies in the band 450-470 MHz for fixed operations.

* * * * *

(e) Coordination of assignable frequencies subject to the provisions of this section will be permitted by any certified frequency coordinator. If an applicant elects to obtain a frequency recommendation from the certified frequency coordinator for the service in which the applicant is eligible, the coordinator shall first attempt to recommend a frequency within the applicant's own radio service. If none are available, the coordinator may then recommend a frequency allocated to another radio service. If an applicant elects to obtain a frequency recommendation from a certified coordinator of a service in which the applicant is not eligible, that coordinator may *only* recommend a frequency allocated to the service for which the coordinator is certified. If a coordinator recommends a frequency allocated to a service where the applicant is not eligible on a primary basis, or if a recommended frequency is shared by more than one radio service on a primary basis, then the coordinator must notify all coordinators certified to recommend that frequency on a primary basis. If any of these coordinators objects to a recommendation, they must notify the coordinator making the frequency recommendation of such objection within 10 working days, as calculated in accordance with § 1.4 of the Rules, from receipt of the notification. The recommending coordinator should attempt to resolve any objections raised by the notified coordinators and may not submit the application to the Commission prior to the expiration of this 10-day period.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Pacific Bell and Nevada Bell Notice and Petition for Removal of the Structural Separation Requirement and Waiver of Certain Federal and State Tariffing Requirements	**CC Docket No. 90-623** **CC Docket No. 88-2, Phase I**

MEMORANDUM OPINION AND ORDER

Adopted: May 20, 1993; Released: May 21, 1993

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On November 23, 1992, Pacific Bell and Nevada Bell (PacTel), filed with the Commission a petition for structural relief, pursuant to the *BOC Safeguards Order*.[1] In addition, PacTel filed a request for waivers of the federal tariffing requirement for particular Open Network Architecture (ONA) services and the state tariffing requirement for certain ONA services in certain states. We find that PacTel has made the appropriate showing for waiver of the federal tariffing requirement for certain services. We also find that PacTel has adequately demonstrated that a waiver of the state tariffing requirement is propriate for each of the ONA services in the states it identifies. We further find, in view of our grant of these waivers, that PacTel has made the requisite showing for a grant of its petition for structural relief. Accordingly, we grant PacTel's petition.

2. In the *BOC Safeguards Order,* the Commission concluded that Bell Operating Company (BOC) provision of enhanced services pursuant to nonstructural safeguards would serve the public interest, and established conditions for the removal of the structural separation requirement for BOC provision of enhanced services. Once a BOC believes that it has met the requirements for removal of structural separation, it must demonstrate that it: 1) has federal tariffs in effect for each of its initial interstate ONA services; 2) is technically prepared to offer each of its initial ONA services; and 3) has filed state tariffs for each of its initial ONA intrastate services.[2]

3. In its petition, PacTel certifies that, provided that the Commission grants the requested waivers, it has taken all of the steps specified for initial ONA implementation. It therefore petitions the Commission for removal of the structural separation requirement.[3]

II. FEDERAL TARIFFING REQUIREMENTS

4. *Reclassifying BSEs as CNSs.* PacTel petitions the Commission to reclassify three services, Selective Call Forwarding, Selective Call Rejection, and Automatic Call Back as Complementary Network Services (CNSs) alone rather than as both Basic Service Elements (BSEs) and CNSs.[4] PacTel states that these services are primarily provided to end users rather than to enhanced service providers (ESPs), and all other BOCs offering these services classify them solely as CNSs. No party filed comments opposing this reclassification. On the basis of the record before us, we conclude that the services are used by end users and not enhanced service providers, and thus are most appropriately considered to be CNSs and not BSEs.[5] Therefore, we grant this request.

5. *Caller ID Services.* PacTel also requests that we grant it an indefinite waiver of the federal tariffing requirement for its two "caller ID" services: Calling Number Delivery via ICLID and BCLID.[6] PacTel argues that technological difficulties prevent it from filing a federal tariff consistent with the requirements of the Public Utilities Commission of the State of California (California PUC) that PacTel's caller ID services must provide customers with their choice of one of three blocking options. PacTel argues that the California PUC's requirements make it uneconomic to offer caller ID services in California. The California PUC argues that there is no inconsistency between tariffing the Caller ID service with per-call blocking in the federal jurisdiction and allowing a choice of either per-call or

---

[1] Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, CC Docket No. 90-623, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order), pets. for recon. pending, pets. for rev. pending,* California v. FCC, No. 92-70083 (9th Cir. filed Feb. 14, 1992).

[2] *BOC Safeguards Order,* 6 FCC Rcd at 7624-7625, n.212.

[3] PacTel Petition at 1-2. The Commission and the Common Carrier Bureau have previously granted requests by PacTel for waivers of the federal tariffing requirement for particular ONA services. *See Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for ONA, Filing and Review of ONA Plans,* Memorandum Opinion and Order, CC Docket Nos. 89-79 and 88-2, 7 FCC Rcd 811 (1992) (*Federal Tariff Waiver Order),* Memorandum Opinion and Order on Reconsideration, CC Docket Nos. 89-79 and 88-2, 7 FCC Rcd 7241 (1992) (*Second Federal Tariff Waiver Order);* Memorandum Opinion and Order, CC Docket Nos. 89-79 and 88-2, 8 FCC Rcd 448 (1993) (*Third Federal Tariff Waiver Order).*

[4] PacTel Petition for Waiver at 2-3.

[5] This approach is consistent with our response to a similar request from NYNEX. *See Federal Tariff Waiver Order,* 7 FCC Rcd at 814.

[6] PacTel Petition for Waiver at 3-7. PacTel uses the name "Calling Number Delivery via ICLID" for the ONA service "Calling Number Delivery via Individual Calling Line Identification." Likewise, PacTel uses "Calling Number Delivery via BCLID" for the ONA service "Calling Number Delivery via Bulk Calling Line Identification."

per-line blocking in the state jurisdiction.[7] MCI argues that PacTel should not be permitted to delay tariffing its caller ID services.[8]

6. In the *Caller ID Proceeding* Notice of Proposed Rulemaking, the Commission sought comment on its tentative conclusion that a reasonable blocking mechanism was necessary to recognize the privacy concerns of the called and calling parties. In addition, the Commission sought comment on whether it is possible for intrastate and interstate caller ID regulatory systems to coexist. In its waiver request, PacTel has explained the California PUC's blocking requirements and their effect on the economic and technological practicality of offering interstate caller ID services at this time. In light of PacTel's explanation, we grant PacTel a limited temporary waiver to delay the federal tariffing of its caller ID services until 90 days after the Commission reaches a decision in the *Caller ID Proceeding*.

7. *Selective Call Acceptance*. PacTel also requests a waiver to delay the federal tariffing of Selective Call Acceptance (SCA) for technical reasons. SCA provides subscribers with the ability to accept only calls from a specified list of telephone numbers.[9] According to PacTel, SCA confirms telephone numbers by way of a Transaction Capability Application Part (TCAP) query before they can be added to a customer's list of numbers.[10] PacTel further states that initially, TCAP delivery was envisioned as an intraLATA-only capability, and that interstate TCAP message delivery will not be available for three to seven years. PacTel further contends that the costs of altering the interstate service so that it would work without TCAP would be in the range of $1.5-2.0 million.[11] MCI opposes PacTel's request for a waiver due to PacTel's failure to raise these arguments in an earlier waiver request.[12] In its reply comments, PacTel explains that as the deployment of SS7 progressed, it encountered unanticipated technical problems with respect to the interstate provision of TCAP message delivery. PacTel contends that these problems were not apparent when it filed its previous waiver request.

8. Based on its explanation, we conclude that PacTel acted reasonably in filing its waiver request. We further conclude that, because interstate TCAP is not currently available, PacTel is technically unable to offer SCA as it originally intended. In addition, Pactel estimates that it would cost $1.5-2.0 million to provide alternative call acceptance functions without TCAP verification. For these reasons, we grant PacTel a temporary waiver of the federal tariffing requirement for SCA for a period of three years to allow it to develop the technical capabilities necessary to offer this service.[13] If PacTel still is unable to offer SCA in its interstate tariffs at the end of the three-year period, it must reapply for a waiver.

9. *Packet Switching Services*. PacTel states that when it filed its previous ONA BSE waiver request, it inadvertently omitted two packet switched services: Preselection of Data Services and Fast Select Request (Packet).[14] These services are classified as BSE/CNSs in the PacTel ONA Plan. PacTel requests a waiver to refrain from federally tariffing these packet services in Nevada. PacTel advances the same argument it gave earlier for refraining from tariffing the other packet services in Nevada; it does not have the technical capability to offer any packet switched services in Nevada. We therefore grant PacTel's request as to these packet services it omitted from its original request.[15]

III. STATE TARIFFING REQUIREMENTS

10. PacTel claims that, due to the lack of requisite general market demand, a few services in state jurisdictions are available only on a individual case basis (ICB).[16] PacTel certifies that any customer in either state in its region can request any of these services, even though some of the services may be offered through ICB arrangements.[17] As a

---

[7] California PUC Comments at 4. The California PUC also repeats the arguments about the federal tariffing of Caller ID that it previously made in *Rules and Policies Regarding Calling Number Identification Service*, Notice of Proposed Rulemaking, CC Docket No. 91-281, 6 FCC Rcd 6752 (1991) (*Caller ID Proceeding*). *See* California PUC Comments at 3-9. The California PUC's arguments will be addressed in the *Caller ID Proceeding*. The California PUC further argues generally that the Commission has no authority to require or prohibit the tariffing of intrastate services, including caller ID, or to waive such requirements. California PUC Comments at 2. We have previously addressed these arguments in the *BOC Safeguards Order* and the *BOC ONA Proceeding* and need not address them further here. *See, e.g., BOC Safeguards Order*, 6 FCC Rcd at 7630-37; Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2 Phase I, 5 FCC Rcd 3084, 3088-90 (*BOC ONA Reconsideration Order*).

[8] MCI Comments at 11.

[9] PacTel Petition for Waiver at 7-10.

[10] According to PacTel, the TCAP query determines that a number is working and capable of generating a call to the SCA customer. *Id.* at 8.

[11] *Ex Parte* Letter from Betsy Stover Granger, Attorney, PacTel, to Donna Searcy, Secretary, FCC, April 8, 1993 at 3-5 (PacTel *ex parte*, April 8, 1993). As another alternative to SCA, PacTel contends that customer premises equipment (CPE) could perform similar call acceptance functions, once interstate caller ID is available, without the need for TCAP. *Id.*

[12] MCI Comments at 11. We previously granted PacTel a temporary waiver of the federal tariffing requirement for SCA in California and Nevada until December 31, 1992 to allow for the complete deployment of Signaling System 7 (SS7). *Second Federal Tariff Waiver Order*, 7 FCC Rcd at 7243-44.

[13] We note that SCA is now available in California through PacTel's intrastate tariffs as an intrastate service. PacTel *ex parte*, April 8, 1993 at 3. In addition, SCA is available in Nevada through an ICB arrangement. *See* note 14 *infra*.

[14] PacTel states that in its previous waiver request for Nevada Bell, it listed the service "Fast Select Hunt Group (Packet)." PacTel states that the correct name of the BSE is "Hunt Group (Packet)," and Fast Select Request (Packet) is a separate service which is classified as a BSE/CNS. *Id.* at 10, n.9.

[15] *See Second Federal Tariff Waiver Orders*, 7 FCC Rcd at 7243.

[16] PacTel *ex parte*, April 8, 1993 at 7. PacTel declares that due to a lack of intrastate demand in California and Nevada, two services, Call Forward Busy/Don't Answer - Customer Control Activation/Deactivation and Call Forward Busy/Don't Answer - Customer Control Forward to Number, are available in both states only through an ICB arrangement. In addition, PacTel declares that DID Trunk Queuing will be offered in California through an ICB arrangement, as demand does not currently warrant a generalized tariff offering. PacTel Petition for Waiver at 11-12. PacTel states that due to lack of intrastate demand, four services will be offered in Nevada only through an ICB arrangement: Warm Line; Answer Supervision with Lineside Interface; Selective Call Acceptance; and Call Forwarding Variable/Remote Activation/Control. *Id.* at 16; PacTel *ex parte*, April 8, 1993 at 7.

[17] PacTel Petition for Waiver at 11-12, 16; PacTel *ex parte*, April 8, 1993 at 7.

result, PacTel claims that the state tariffing requirement for these services has been satisfied. In addition, PacTel seeks a waiver of the requirement that state tariffs be filed in Nevada for eleven initial intrastate ONA services, which are the intrastate equivalents of interstate services for which the Commission has already waived the federal tariffing requirement.[18] PacTel also seeks a waiver to delay offering three intrastate ONA services because further technical development is necessary.[19] PacTel seeks an additional waiver for Nevada for five ONA services that were detariffed by the state of Nevada but are available in that state through an ICB arrangement.[20] Finally, PacTel states that because it does not have the technical capability to offer packet switching access service in Nevada, it seeks a waiver of the state tariffing requirement in Nevada for four related services.[21]

11. We conclude that PacTel has adequately demonstrated that a waiver is appropriate for the particular intrastate ONA services in the states it identifies.[22] We require that PacTel clearly indicate in its state tariffs those intrastate ONA services available through ICB arrangements and that it file general tariffs for these services as soon as there is sufficient demand. We also grant temporary waivers for the three services delayed due to technical limitations. We grant PacTel a waiver for three years from the date of release of this order for Deluxe Call Waiting. Likewise, we grant PacTel a waiver for five years for Dual Telephone Coverage. For Call Forwarding/Remote Activation/Control, we grant PacTel a waiver from the state tariffing requirement until November 30, 1993. With these conditions, we grant PacTel a limited waiver of the state tariffing requirement of the *BOC Safeguards Order*.

IV. PETITION FOR STRUCTURAL RELIEF

12. MCI and the Newspaper Association of America (NAA) filed comments opposing removal of the structural separation requirement for PacTel. MCI argues that the Commission should not grant structural relief while relying partly on the federal tariffs PacTel filed for initial ONA services, because the federal tariffs do not properly implement ONA goals.[23] MCI also argues that the BOCs have made little progress in implementing ONA, and that the Commission must consider intrastate ONA problems in deciding whether to release PacTel from structural separation requirements.[24]

13. NAA opposes PacTel's petition, arguing that the three prerequisites to a grant of structural relief ignore the likely competitive harm from entry by the BOCs into the enhanced services marketplace on an integrated basis. Therefore, NAA argues, the Commission should not grant structural relief until the BOCs are prevented from exploiting their local exchange monopoly in the enhanced services marketplace.[25] NAA further argues that the Commission should refrain from granting the petition until the *BOC Safeguards Order* and the *BOC ONA Amendment Order* is reviewed by the courts.[26]

14. None of the commenters in this proceeding has set forth any new substantive reason why PacTel's petition should not be granted. Instead, the commenters disagree with Commission policy on nonstructural safeguards, the effective implementation of ONA, and the role of state tariffs in the ONA process. In the *BOC Safeguards Order*, the *BOC ONA Proceeding*, and the *Part 69/ONA Order*, the Commission addressed arguments about the appropriateness of lifting the structural separation requirement, the role of state tariffs in the ONA process, and the pricing of interstate ONA services.[27] This order merely implements the Commission's decision to substitute nonstructural safeguards for structural separation; it is not the proper forum for parties to reargue the merits of that Commission decision.

---

[18] PacTel Petition for Waiver at 15. The eleven services are: Call Redirection (Packet); Closed User Groups (Packet); Fast Select Hunt Group (Packet); Fast Select Acceptance (Packet); Fast Select Request (Packet); Reverse Charge Acceptance (Packet); Network Reconfiguration; Automatic Protection Switching, Secondary Channel Capability; Calling Number Delivery via BCLID; and DID Trunk Queuing. *See Second Federal Tariff Waiver Order*, 7 FCC Rcd 7243-44.

[19] PacTel states that due to technical limitations, Deluxe Call Waiting (Call Waiting with Forwarding Options) will not be available for at least three years, and that Dual Telephone Coverage (Call Forwarding to Multiple Locations) will not be available for at least five years. PacTel further states that none of the other BOCs listed either of these services in its ONA Plan. PacTel also states that while it currently lacks the technical capability to offer Call Forwarding/Remote Activation/Control, it will be able to tariff this service by November 1993. PacTel Petition for Waiver at 12-13.

[20] The five services are: Call Forward Multiple Simultaneous Calls Interswitch; Call Forward Variable - Activation without Courtesy Call; Call Waiting Cancel; Shared Speed Calling; and Speed Calling. *Id.* at 16.

[21] The four services are: C2 Type A X.25 Packet Switched; C2 Type B X.75 Packet Switched; Direct Call (Packet); and Preselection of Data Services. *Id.* at 10, 15; PacTel *ex parte*, April 8, 1993 at 7-8.

[22] *See* para. 10 *supra*. For the ONA services listed in note 16 *supra*, for which PacTel has already received interstate waivers in previous Commission and Common Carrier Bureau orders, we grant corresponding intrastate waivers under the same conditions. In addition, for the same reason that, in this Order, we grant PacTel a waiver of the federal tariffing requirement for its caller ID services, we also grant PacTel a temporary waiver of the state tariffing requirement for its caller ID services in California. *See* para. 6 *supra*.

[23] MCI Comments at 2-4.

[24] *Id.* at 4-6.

[25] NAA Comments at 1-4.

[26] *Id.* at 4-6.

[27] *BOC Safeguards Order*, 6 FCC Rcd at 29-30, 44-55; Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2 Phase I, 4 FCC Rcd 1, 162-171 (1988) (*BOC ONA Order*), *modified on reconsideration*, 5 FCC Rcd 3084 (1990) (BOC ONA Reconsideration Order), 5 FCC Rcd 3103, 3112-3113 (1990) (*BOC ONA Amendment Order*), *Erratum*, 5 FCC Rcd at 4045, *pets. for recon. pending, pets. for rev. pending, California v. FCC* No. 90-70336 (9th Cir. filed July 5, 1990; 6 FCC Rcd 7646, 7663-7664 (1991) (*BOC ONA Further Amendment Order*), *pet. for rev. pending, MCI Telecommunications Corp. v. FCC* No. 92-70189, (9th Cir. filed Feb. 19, 1992), DA 93-362 (released March 29, 1993) (*BOC ONA Second Further Amendment Order*); *Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture; Policy and Rules Concerning Rates for Dominant Carriers*, Report and Order & Order on Further Reconsideration & Supplemental Notice of Proposed Rulemaking, CC Docket Nos. 89-79 and 87-313, 6 FCC Rcd 4524 (1991) (*Part 69/ONA Order*), *pets. for recon. pending*.

15. We therefore consider whether, in view of our grant of a waiver of the state tariffing requirement for several intrastate ONA services in certain states and a waiver of the federal tariffing requirement for certain ONA services, PacTel has made the requisite showing for structural relief. We conclude that it has. First, PacTel certifies that it is technically prepared to offer each of its initial ONA services consistent with its ONA plan. Second, with our grant of a waiver, PacTel certifies that it has effective federal tariffs for these services. Finally, with our grant of a waiver, PacTel has satisfied the requirement that it file state tariffs for its initial ONA services. In addition, we see no reason to take the unusual step of delaying our grant of PacTel's petition, as suggested by NAA, until the courts have reviewed the *BOC Safeguards Order*. Accordingly, we grant PacTel's petition.

16. PacTel must continue to comply with the BOC ONA plan and reporting requirements established in the *BOC Safeguards* and *ONA* proceedings.[28] In the *BOC ONA Further Amendment Order* the Commission required that the BOCs file further amendments and annual reports on their progress in implementing ONA.[29] In addition, in the *BOC Safeguards Order*, the Commission stated that it would review nonstructural safeguards after all of the BOCs have operated under a full ONA environment for three years.[30] We grant PacTel's petition for structural relief subject to these ongoing ONA requirements.

V. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED, that pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. Sections 0.91 and 0.291, a waiver for PacTel of the initial federal tariffing requirement for certain interstate ONA services IS GRANTED.

18. IT IS FURTHER ORDERED, that a waiver for PacTel of the initial state tariffing requirement for certain intrastate ONA services in certain states IS GRANTED.

19. IT IS FURTHER ORDERED, that PacTel's Petition for Removal of the Structural Separation Requirement IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief,
Common Carrier Bureau

---

[28] In its Petition for Waiver, PacTel requests that the Commission waive the requirement that BOC enhanced services operations take the same access to certain BOC operations support systems that BOCs provide to independent enhanced service providers. The Commission has subsequently decided this issue, and we need not address it here. *See In the Matter of Filing and Review of Open Network Architecture Plans*, Phase I, Memorandum Opinion and Order on Reconsideration, CC Docket No. 88-2, 8 FCC Rcd 97 (1993) (*BOC ONA Amendment Reconsideration Order*).

BOCs are not required to file comparably efficient interconnection (CEI) plans for the provision of enhanced services once the BOCs have implemented ONA and the structural separation requirements have been removed. Therefore, we also dismiss as moot PacTel's pending CEI plan for protocol conversion services. See *Pacific Bell and Nevada Bell Plan for the Provision of Comparably Efficient Interconnection for Protocol Conversion Services*, DA 92-548, (filed March 19, 1992).

[29] *BOC ONA Further Amendment Order*, 6 FCC Rcd at 7649-7650, Appendix B. BOCs must also comply with amendment and annual report requirements established in the *BOC ONA Second Further Amendment Order* and the *BOC ONA Amendment Reconsideration Order*.

[30] *BOC Safeguards Order*, 6 FCC Rcd at 7625.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-125

In re Applications of

BENNETT GILBERT GAINES, INTERLOCUTORY RECEIVER FOR MAGIC 680, INC. — File No. BR-880830UA

For Renewal of License
for Station WCBM(AM),
Baltimore, Maryland

BENNETT GILBERT GAINES, INTERLOCUTORY RECEIVER FOR MAGIC 680, INC. (Assignor) — File No. BAL-881117EB

and

WCBM MARYLAND, INC.
(Assignee)

For Consent to the Assignment
of License of Station WCBM(AM)
Baltimore, Maryland

MOUNT VERNON BROADCASTING
Baltimore, Maryland — File No. BP-880901AD

For a Construction Permit
for a New AM Station

MEMORANDUM OPINION AND ORDER

Adopted: June 2, 1993; Released: June 10, 1993

By the Review Board: MARINO (Chairman), BLUMENTHAL,[1] and GREENE.

1. In a *Decision* in this proceeding, 8 FCC Rcd 1405 (Rev. Bd. 1993), the Review Board affirmed the *Initial Decision* (I.D.), 7 FCC Rcd 1976 (1992), of Administrative Law Judge John M. Frysiak (ALJ), which granted the applications of Bennett Gilbert Gaines, the interlocutory receiver of Station WCBM (AM), Baltimore, Maryland, for renewal of the station's license and for assignment of the license to WCBM Maryland, Inc. (WCBM Maryland). The ALJ also denied the competing application of Mount Vernon Broadcasting (Mount Vernon) for the same facilities. The ALJ's ultimate disposition was based on his resolution of an unauthorized transfer of control issue favorably to Gaines and WCBM Maryland, and a financial qualifications issue unfavorably to Mount Vernon. The Board affirmed these conclusions. *Decision*, at ¶ ¶ 12, 20, 28, 32 and 35. We now have before us a petition for reconsideration, filed April 5, 1993, by Mount Vernon; a joint opposition, filed April 20, 1993, by WCBM Maryland and Gaines; an opposition, filed April 20, 1993, by the Mass Media Bureau; and a reply, filed April 30, 1993, by Mount Vernon.

2. In its petition, Mount Vernon argues, with respect to the transfer of control issue, that WCBM Maryland must be found to have seized control of the AM station in the spring of 1989, even if it is not deemed to have assumed control earlier in the fall of 1988. Mount Vernon contends that the assumption of control by WCBM Maryland in the spring of 1989 is best evidenced by the firing of a key employee of the station contrary to the wishes of the receiver, Gaines, and by Gaines' refusal to sign checks for the station payroll beginning in 1989. Petition, at pp. 2-3.

3. We disagree that these factors establish that an unauthorized transfer of control of WCBM occurred in 1989. To be successful, a petition for reconsideration must rely on new facts, changed circumstances, or material errors or omissions in the underlying opinion. *Radio Representatives, Inc.*, FCC 93R-22, released May 25, 1993; *Isis Broadcast Group*, 8 FCC Rcd 24 (Rev. Bd. 1993). A petition which simply reiterates arguments previously considered and rejected will be denied. *WWIZ, Inc.*, 37 FCC 685 (1965), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). Here, despite our specific admonition to Mount Vernon in our *Decision*, at ¶ 13, that it may not simply refer to its proposed findings of fact and conclusions of law in lieu of providing specific hearing or exhibit page references in support of its exceptions, *see* 47 CFR 1.277(c), Mount Vernon's petition once again cites only to its proposed findings and conclusions for support.

4. Nevertheless, the matters referred to are not new and have received full consideration. Our *Decision*, at ¶ 2, not only found the I.D. to be "supported by the factual record and controlling precedent," but specifically adopted the ALJ's findings of fact. Therein, at I.D., ¶ ¶ 20-27, the ALJ fully describes the incidents in March 1989 surrounding the firing of the station's chief engineer, Fred Klines, following an attempt by Metromedia to evict WCBM Maryland from the premises. Gaines was out of the country at the time, I.D., ¶ 21, and contrary to Mount Vernon's contention that the firing contradicted Gaines' directions and intentions, Gaines later acquiesced in the decision to terminate Klines and told Klines that he supported Mangione's decision to do so. *Id.* at ¶ 22. As the ALJ further found, the only material change that occurred in the spring of 1989 in the operation of the consulting agreement was the manner in which the payroll was handled. *Id.* at ¶ 27. Gaines continued to confer with the

[1] Board Member Blumenthal had concurred in result only in the majority *Decision*, but agrees that grounds for reconsideration have not been shown, as a matter of law.

consultant in order to supervise the operation of the station. *Id.* The ALJ concluded, *id.* at ¶ ¶ 87-88, and, once again, we agree that:

> In sum, the evidence establishes that Gaines has lawfully delegated responsibility for day-to-day operations of WCBM Maryland under the consulting agreement, but that he has continuously exercised ultimte control over WCBM's finances, personnel, programming and other aspects of station operation throughout the term of his Receivership.
>
> The incidents of March 1989 have no significant material bearing on Gaines' control of the station's operation. ... The record reflects that WCBM Maryland has at all times continued to operate the radio station at the request of Gaines and under his ultimate control.

5. With regard to Mount Vernon's financial qualifications, our *Decision*, at ¶ 20, affirmed the ALJ's finding, I.D. ¶ 54, that Mount Vernon's September 26, 1990 amendment and new financial certification "did not say anything about leasing the [Metromedia] property..." and that "in September of 1990, Falcon's intent was to buy the property (Tr. 2349)." We indicated that the ALJ's findings were fully supported by the record which established that "from September of 1989 until November of 1990, there was no indication that Metromedia had agreed to lease its facilities to Mount Vernon or any other party." On reconsideration, Mount Vernon argues that this reading of the record "is contrary to Falcon's testimony. It also runs counter to the very set of documents which support [its] claim to site availability". Petition at pp. 3, 5.

6. The ALJ's finding, which Mount Vernon challenges, is supported by the following additional finding (which is based upon Falcon's oral testimony and documentary evidence): "... prior to that date [November 9, 1990] Falcon had never discussed a lease arrangement with Metromedia and has never gotten an amount that it would cost to lease the site (Tr. 2277, 2281-2, 2291, 2352); Declaration of Richard V. Falcon dated September 6, 1989...." I.D., ¶ 55. Moreover, the Joint Opposition at pp. 2-3 note 2 reproduces the following testimony by Falcon which also supports the ALJ's challenged finding:

> Q. [Counsel]: Okay, and did they [Metromedia] also give you -- did they also discuss a lease arrangement at that time [September 1990]?
>
> A. (Mr. Falcon): No. (Tr. 2281-82)
>
> * * *
>
> Q. Did you have any indication in September of 1990 that they would lease the site to you?
>
> A. There was no specific reference to a lease in September of 1990, no.
>
> Q. And in fact, you didn't ask them for a lease price in September of 1990, did you?
>
> A. No. (Tr. 2281-2282)
>
> * * *
>
> Mr. Falcon: Until November 9, 1990, which was after the certification date, I never had any discussions with anybody about leasing the property. (Tr. 2291)
>
> * * *
>
> Q. Is there some reason that you never filed an amendment reflecting that you intended to lease the property?
>
> A. Not -- no. I mean, I can't give you a reason for not having done so, if I didn't do so. (Tr. 2293)

7. These materials from the hearing transcript, the *Initial Decision*, and the Board's *Decision* establish that the point which Mount Vernon raises on reconsideration has been previously considered at three different stages of the administrative process. Reconsideration will not be granted to reargue matters previously decided. *See* cases cited in ¶ 3, *supra*.

8. ACCORDINGLY, IT IS ORDERED, That Mount Vernon Broadcasting's petition for reconsideration, filed April 5, 1993, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-151

In re Applications of

The Rex Company

For Renewal of License of Station KBZB(AM), Bisbee, Arizona — BR-831115UA, BR-900420YB

HEARING DESIGNATION ORDER

Adopted: May 25, 1993; Released: June 10, 1993

By the Commission:

1. The Commission has before it: (a) the captioned applications for renewal of license filed by the Rex Company ("Rex"), licensee of KBZB(AM), Bisbee, Arizona and, (b) the results of an investigation into KBZB(AM)'s silent status.

2. The Commission's records indicate that KBZB(AM) has been silent since at least January 20, 1988. The current renewal of license application for KBZB(AM) has not been acted upon because of the station's silent status.[1] Action on the previous renewal of license application (File No. BR-831115UA) was deferred because the licensee of KBZB(AM) at the time the renewal was filed was a bankruptcy trustee, Bruce D. Bridegroom. On April 21, 1988, the Commission granted an assignment of the KBZB(AM) license from Bridegroom to Rex. This grant was conditioned upon the assignee resuming broadcast operations within sixty days of the consummation of the assignment. The grant further indicated that action upon the then-pending renewal of license application would be withheld until the station returned to the air. On July 7, 1988, the Commission approved the station's application for a construction permit to change its tower location (File No. BP-880120AF). Authority to remain silent during the construction period was approved for the duration of that permit. The permit expired on January 7, 1990 and was cancelled on February 19, 1991, due to the licensee's failure to file either an application for an extension of the permit, or a license to cover the permit. No request to reinstate the permit has been filed by Rex.

3. By letter, dated July 17, 1992, the Chief, AM Branch, Audio Services Division, Mass Media Bureau, requested that Rex submit information concerning its compliance with Section 73.1740 (Minimum Operating Schedule) and Section 73.1750 (Discontinuance of Operation) of the Commission's Rules.[2] Rex responded to this request only after a subsequent letter, dated September 25, 1992, from the Chief, AM Branch, informed Rex that its failure to respond would subject the KBZB(AM) renewal of license application to dismissal for failure to prosecute, pursuant to Section 73.3568(b) of the Commission's Rules. In its response, dated October 13, 1992, Rex stated that it was attempting "to raise additional capital to return KBZB(AM) to the air." No further explanation was given as to its intended steps to resume broadcast operations. By letter, dated December 17, 1992, Rex was granted a further extension of its silent authority, which expired March 14, 1993, and was advised that any future extension request was to be accompanied by a detailed summary of steps taken to return KBZB(AM) to on-air operations. Rex has not requested an extension and is currently off the air without authority. This fact, coupled with KBZB(AM)'s long-standing silence, supports our determination that Rex is in apparent violation of Sections 73.1740(a)(4) and 73.1750 of the Commission's Rules. We believe that the evidence before us is sufficient to raise a substantial and material question of fact regarding Rex's capability and intent to resume the broadcast operations of KBZB(AM). We will therefore designate the KBZB(AM) renewal of license applications for an evidentiary hearing on appropriate issues specified below.

4. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. Sec. 309(e), the renewal of license applications of Station KBZB(AM), Bisbee, Arizona, ARE DESIGNATED FOR HEARING at a time and place to be specified in a subsequent Order, upon the following issues:

---

[1] It is the Commission's general policy to defer action on a station's renewal of license application while that station is silent.

[2] Section 73.1740(a)(4) provides:

> "In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary."

Section 73.1750 provides:

> "The licensee of each station shall notify the FCC in Washington, D.C. of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation."

(a) To determine whether the Rex Company has the capability and intent to expeditiously resume broadcast operations of KBZB(AM) consistent with the Commission's Rules.

(b) To determine whether the Rex Company has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules;

(c) To determine, in light of the evidence adduced pursuant to the preceding issues, whether or not grant of the subject renewal of license applications would serve the public interest, convenience and necessity.

5. IT IS FURTHER ORDERED, That in the event it is determined that grant of the renewal of license applications would serve the public interest, convenience and necessity, the grant will be conditioned on the expeditious resumption of operation, the precise period of time to be established in the hearing. Failure to resume operations within the time specified in the condition will result in the cancellation of the license and the deletion of the station's call letters.

6. IT IS FURTHER ORDERED, That, in accordance with Section 309(e) of the Communications Act of 1934, as amended, both the BURDEN OF PROCEEDING with the introduction of evidence and the BURDEN OF PROOF with respect to the issues specified above shall be upon the LICENSEE, The Rex Company.

7. IT IS FURTHER ORDERED, That to avail itself of the opportunity to be heard, the licensee, pursuant to Section 1.221(c) of the Commission's Rules, SHALL FILE with the Commission, in person or by attorney, within twenty (20) days of the mailing of this Order, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

8. IT IS FURTHER ORDERED, That the licensee herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended. and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rules, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

9. IT IS FURTHER ORDERED, That, if it is determined that the hearing record does not warrant an Order denying the renewal of license applications of KBZB(AM), Bisbee, Arizona, it shall be determined, pursuant to Section 503(b) of the Communications Act of 1934, as amended, whether an ORDER OF FORFEITURE shall be issued against the licensee in an amount not exceeding $250,000.00 for the willful and/or repeated violation of Section 73.1740 and/or 73.1750 of the Commission's Rules.

10. IT IS FURTHER ORDERED, That, in connection with the possible forfeiture liability noted above, this document constitutes notice pursuant to Section 503(b)(3) of the Communications Act of 1934, as amended. The Commission has determined that, in every case designated for hearing involving alleged violations which also come within the purview of Section 503(b) of the Communications Act of 1934, as amended, it shall, as a matter of course, include this forfeiture notice as to maintain the fullest possible flexibility of action. Accordingly, we stress that the inclusion of this notice is not to be taken as in any way indicating what the initial or final disposition of this case should be.

11. IT IS FURTHER ORDERED, That the Secretary send by Certified Mail-Return Receipt Requested, a copy of this Order to the licensee at the following address:

Marvin King, General Manager
The Rex Company
1121 Plaza Azul
Sierra Vista, Arizona 85635

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-152

In re Application of

Moenkopi Communications, Inc.

For Renewal of License of Station KCNY(AM), Moab, Utah — BR-900703YA

HEARING DESIGNATION ORDER

Adopted: May 25, 1993; Released: June 10, 1993

By the Commission:

1. The Commission has before it: (a) the captioned application for renewal of license filed by Moenkopi Communications, Inc. ("Moenkopi"), licensee of KCNY(AM), Moab, Utah; and, (b) the results of an investigation into KCNY(AM)'s silent status.

2. The Commission's records indicate that KCNY(AM) has been silent since December 11, 1989. The station's authority to remain silent expired on June 13, 1990. The current renewal of license application for KCNY(AM) has not been acted upon because of the station's silent status.[3] On April 15, 1988, the Commission approved the station's application for a construction permit to change its tower location (File No. BP-880111AJ). Authority to remain silent during the construction period was approved for the duration of that permit. The permit expired on October 15, 1989 and was cancelled on February 19, 1991, due to the licensee's failure to timely file either an application for an extension of the permit, or a license to cover the permit. No request to reinstate the permit has been filed by Moenkopi.

3. By letters, dated October 26, 1990, June 24, 1991, November 15, 1991, February 28, 1992, May 22, 1992, and July 8, 1992, the Chief, AM Branch, Audio Services Division, Mass Media Bureau, requested that Moenkopi submit information concerning its compliance with Section 73.1740 (Minimum Operating Schedule) and Section 73.1750 (Discontinuance of Operation) of the Commission's Rules.[4] A number of these letters were returned as undeliverable and no response to any of these inquiries was ever received. By subsequent letter, dated January 29, 1993, after the staff was able to locate a principal of Moenkopi, the Chief, AM Branch, informed Moenkopi that its failure to respond to such inquiries would subject the KCNY(AM) renewal of license application to dismissal for failure to prosecute, pursuant to Section 73.3568(b) of the Commission's Rules. In its response, dated February 10, 1993, Moenkopi stated that it would attempt to return to the air if it had "assurance from the FCC [that it would have the] time to assemble the money and the equipment to resume broadcasting." No further explanation was given as to the reasons the station has been off the air for this protracted period or the steps Moenkopi intends to take to resume broadcast operations. Consequently, KCNY(AM) is currently off the air without authority. This fact, coupled with the fact that the licensee has kept KCNY(AM) off the air for over three years, supports our determination that Moenkopi is in apparent violation of Sections 73.1740(a)(4) and 73.1750 of the Commission's Rules. We believe that the evidence before us is sufficient to raise a substantial and material question of fact regarding Moenkopi's capability and intent to resume the broadcast operations of KCNY(AM). We will therefore designate the KCNY(AM) renewal of license application for an evidentiary hearing on appropriate issues specified below.

4. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. Sec. 309(e), the renewal of license applications of Station KCNY(AM), Moab, Utah, IS DESIGNATED FOR HEARING at a time and place to be specified in a subsequent Order, upon the following issues:

(a) To determine whether Moenkopi Communications, Inc. has the capability and intent to expeditiously resume broadcast operations of KCNY(AM) consistent with the Commission's Rules.

---

[3] It is the Commission's general policy to defer action on a station's renewal of license application while that station is silent.

[4] Section 73.1740(a)(4) provides:

"In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary."

Section 73.1750 provides:

"The licensee of each station shall notify the FCC in Washington, D.C. of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation."

(b) To determine whether Moenkopi Communications, Inc. has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules;

(c) To determine, in light of the evidence adduced pursuant to the preceding issues, whether or not grant of the subject renewal of license application would serve the public interest, convenience and necessity.

5. IT IS FURTHER ORDERED, That, in the event it is determined that grant of the renewal of license application would serve the public interest, convenience and necessity, the grant will be conditioned on the expeditious resumption of operation, the precise period of time to be established in the hearing. Failure to resume operations within the time specified in the condition will result in the cancellation of the license and the deletion of the station's call letters.

6. IT IS FURTHER ORDERED, That, in accordance with Section 309(e) of the Communications Act of 1934, as amended, both the BURDEN OF PROCEEDING with the introduction of evidence and the BURDEN OF PROOF with respect to the issues specified above shall be upon the LICENSEE, Moenkopi Communications, Inc.

7. IT IS FURTHER ORDERED, That to avail itself of the opportunity to be heard, the licensee, pursuant to Section 1.221(c) of the Commission's Rules, SHALL FILE with the Commission, in person or by attorney, within twenty (20) days of the mailing of this Order, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

8. IT IS FURTHER ORDERED, That the licensee herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rules, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

9. IT IS FURTHER ORDERED, That, if it is determined that the hearing record does not warrant an Order denying the renewal of license application of KCNY(AM), Moab, Utah, it shall be determined, pursuant to Section 503(b) of the Communications Act of 1934, as amended, whether an ORDER OF FORFEITURE shall be issued against the licensee in an amount not exceeding $250,000.00 for the willful and/or repeated violation of Section 73.1740 and/or 73.1750 of the Commission's Rules.

10. IT IS FURTHER ORDERED, That, in connection with the possible forfeiture liability noted above, this document constitutes notice pursuant to Section 503(b)(3) of the Communications Act of 1934, as amended. The Commission has determined that, in every case designated for hearing involving revocation or denial of assignment, transfer, or renewal of license for alleged violations which also come within the purview of Section 503(b) of the Communications Act of 1934, as amended, it shall, as a matter of course, include this forfeiture notice so as to maintain the fullest possible flexibility of action. Accordingly, we stress that the inclusion of this notice is not to be taken as in any way indicating what the initial or final disposition of this case should be.

11. IT IS FURTHER ORDERED, That, henceforth, the Chief, Mass Media Bureau, shall have the DELEGATED AUTHORITY to designate for hearing the renewal of license applications of silent broadcast stations.

12. IT IS FURTHER ORDERED, That the Secretary send by Certified Mail-Return Receipt Requested, a copy of this Order to the licensee at the following address:

Michael A. Youngren, President
Moenkopi Communications, Inc.
380 Kensington Avenue
Salt Lake City, Utah 84115

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Multichannel Media, Inc. — File No. 9894-CM-P-83

For Authority to Construct
and Operate Multichannel Multipoint
Distribution Service station on the
F-group channels at Beaumont, Texas

MEMORANDUM OPINION AND ORDER

Adopted: June 3, 1993; Released: June 10, 1993

By the Chief, Domestic Facilities Division:

1. *Introduction.* Before the Division is the above-referenced application of Multichannel Media, Inc. (Multichannel) to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the F-group channels at Beaumont, Texas. As the result of a Commission lottery held on February 26, 1993, the above-referenced MMDS application was selected for qualification review. Multi-Micro, Inc. (Multi-Micro) filed a post-lottery Petition to Deny, challenging Multichannel's application. No reply has been filed.

2. *Petition to Deny.* On January 15, 1993, the Commission released Lottery Notice, Report No. MMDSL-47, which listed the MMDS applications to be included in the February 26, 1993 lottery. This list also identified the service area, channel group, and preference group, if appropriate, for each MMDS application.[1] Petitioner claims that Multichannel holds licenses for three MMDS facilities, and therefore, was not eligible for the "B" preference that was indicated in the January 15, 1993 Lottery Notice.[2] As a result, Petitioner contends that Multichannel benefitted from a preference it did not deserve.[3] Therefore, Multi-Micro requests that the above-referenced application be dismissed.

3. *Discussion.* Section 309(d) of the Communications Act, 47 U.S.C. § 309(d)(1) provides that a petition to deny must "set forth specific allegations of fact sufficient to show... that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity." 47 U.S.C. § 309(d)(1). If the Commission determines that a *prima facie* case has been made, then and only then, must the Commission take the second step and determine whether a substantial and material question of fact has been presented. 47 U.S.C. §§ 309(2)(2) and (e). If the Commission finds that no substantial or material question of fact has been presented, no evidentiary hearing need be held. 47 U.S.C. § 309(d)(2). *See, e.g., Astroline Com. Co. Ltd. Partnership v. FCC,* 857 F.2d 1556, 1561 (D.C. Cir. 1988); *Gencom, Inc. v. FCC,* 832 F.2d 171, 180-181 (D.C. Cir. 1987); *Citizens for Jazz on WRVR, Inc. v. FCC,* 775 F.2d 392, 394 (D.C. Cir. 1985).

4. The Commission's *prima facie* inquiry is limited to consideration of the allegations in the petition to deny and any supporting affidavits. In addition, there is the assumption that the specific facts set forth by the petitioner are true. *Id.* In the instant case, a review of the specific allegations of fact, taken as true, would sufficiently establish that the grant of the subject application would be *prima facie* inconsistent with the public interest, convenience and necessity. Proof that the above-referenced applicant filed an incorrect certification of preference would alter the Commission's public interest determination. *See* Section 21.32.

5. Having found that the petition comports with the requirements of Section 309(d)(1), we now must determine whether a substantial and material question of fact has been raised by Petitioner.[4] In making this determination, the Commission must consider the totality of the evidence presented (*i.e.*, the evidence offered in rebuttal, the applications and other matters the Commission may officially notice, as well as the petitioners' evidence). *Astroline,* 858 F.2d at 1561; *Gencom,* 832 F.2d at 181; *Jazz,* 775 F.2d at 394. The evidence before us is sufficient to make an informed and reasoned decision on the merits of Petitioner's allegations without engaging in a further fact-finding process. The material facts underlying the asserted violations in this case are clear. In short, we find that Petitioner has not raised any substantial and material questions of fact.

---

[1] In conducting a lottery, Section 309(i) of the Communications Act of 1934, 47 U.S.C. § 309(i) requires that minority and diversity preferences be awarded to eligible applicants to encourage diversity in the ownership of mass communications. An applicant awarded a preference(s) will have a greater probability of winning the lottery than an applicant lacking them. Preferences are computed by the Commission, in the manner described in Section 1.1623.

[2] Pursuant to Sections 1.1621, 1.1622, and 1.1623, preferences may be awarded as follows:

Group A - Full Diversity, where the applicant certifies that it and/or its owners have no interest in any media of mass communications. Also, Minority Group.

Group B - Full Diversity, where the applicant certifies that it and/or its owners have no interest in any media of mass communications.

Group C - Partial Diversity, where the applicant certifies that it and/or its owners have no interest in more than three mass communications media facilities. Also, Minority Group.

Group D - Partial Diversity, where the applicant certifies that it and/or its owners have no interest in more than three mass communications media facilities.

Group E - No Diversity and Minority Group.

Group F - No Diversity.

[3] A "B" preference was listed in the January 15, 1993 Lottery Notice for Multichannel Media, Inc. (File No. 9894-CM-P-83). As noted above, a "B" preference on a Certification of Preference (FCC Form 346), refers to an applicant which holds no interest in any media of mass communications.

[4] A "substantial" question for this purpose is a question which "arouses sufficient doubt on the point that further inquiry is called for." Jazz, 775 F.2d at 395.

6. Section 309 (i)(3)(A) of the Communications Act, 47 U.S.C. § 309(i)(3)(A), requires that:

> The Commission shall establish rules and procedures to ensure that, in the administration of any system of random selection under this subsection used for granting licenses or construction permits for any media of mass communications, significant preferences will be granted to applicants or groups of applicants, the grant to which of the license or permit would increase the diversification of ownership of the media of mass communications...

See also, Amendment of the Commission's Rules to Allow the Selection from Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearing, 93 FCC 2d 952 (1983)(hereinafter cited as *Lottery Order).* In the *Lottery Order,* the Commission established rules to be used to award preferences in lotteries for media of mass communications. Among the rules adopted in the *Lottery Order* was the requirement that an applicant inform the Commission of changes in its preference status before commencement of a lottery. Applicants remain under a continuing obligation to make certain that the information on file is correct. *Lottery Order,* 93 FCC 2d at 973.

7. In addition, the Lottery Notice specifically stated that all applicants intending to notify the Commission of any error in content must do so on or before January 29, 1993. Our records reveal that Multichannel notified the Commission, by letter dated January 29, 1993, that the "B" preference listed in the January 15, 1993 Lottery Notice was incorrect and should be changed from a "B" preference to an "F" preference ("no diversity"). Our records confirm that Multichannel holds conditional licenses for MMDS facilities for WMH408 at Mobile, Alabama, WMH 341 at Joplin, Missouri, and WMI828 at Jacksonville, North Carolina. Multichannel was assigned an "F" preference in the lottery held on February 26, 1993 to reflect these holdings. *See* February 26, 1993 Final Revised Lottery List MMDSL-47.

8. *Conclusion and Ordering Clause.* Contrary to Petitioner's allegations, Multichannel filed a certification of preference which correctly reflected its mass media holdings. Therefore, having carefully considered all of the pleadings and the evidence submitted, we find that the allegations raised by Petitioner, when read in conjunction with the remainder of the record, are insufficient to raise a substantial or material question of fact. Accordingly, IT IS ORDERED that the Petition to Deny filed by Multi-Micro, Inc. IS HEREBY DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. Petitions for reconsideration, pursuant to 47 C.F.R. Sec. 1.106, or applications for review, pursuant to 47 C.F.R. Sec. 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See,* 47 C.F.R. Sec. 1.4(b).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Maui Adventist School
Kahului, Hawaii — File No. BPLIF-910620DJ

Seabury Hall School
Puunene, Hawaii — File No. BPLIF-911008DL

For Construction Permit and License in the Instructional Television Fixed Service on Channels C1, C2, C3, and C4

MEMORANDUM OPINION AND ORDER

Adopted: May 27, 1993; **Released: June 10, 1993**

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Maui Adventist School (Maui) and Seabury Hall School (Seabury), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on channels C1-C4 in Kahului and Puunene, Hawaii, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first determine their basic eligibility. Both applicants are qualified to be ITFS licensees. Both Maui and Seabury are schools engaged in the formal education of enrolled students, Maui being accredited by the Hawaii Department of Education, and Seabury being accredited by the Western Association of Schools and Colleges. In addition, because both applicants propose to offer formal instructional programming to their own students, they qualify as local applicants.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process, under which a predetermined number of merit points are awarded on the basis of five criteria deemed to be most relevant to determine the applicant best qualified to provide the service for which the ITFS spectrum has been established. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523 (Second Report and Order)*, 101 F.C.C. 2d 49, 65-72 (1985); 47 C.F.R. §74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose request would result in the acquisition by that applicant of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programmming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, Maui and Seabury are awarded points based on the following criteria:

Localism. Each applicant is entitled to four points for being a school serving the formal educational needs of its students.

Accreditation. Maui is accredited by the Hawaii Department of Education, and is entitled to three points for accreditation. Seabury is accredited by the Western Association of Schools and Colleges, and is also entitled to three points for accreditation.

Four-Channel Limitation. Neither applicant is the licensee of, or has filed applications for, additional ITFS facilities in its respective area. Thus, Maui and Seabury are entitled to the two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid." Maui's illustrative schedule and programming grid both propose an average of 20 hours of ITFS programming per channel per week. Since the amount of programming specified does not reach the threshold amount at which merit points are awarded, Maui is entitled to no programming merit points. Seabury's illustrative schedule and programming grid each propose an average of 42 hours of formal educational programming per channel per week. Accordingly, Seabury is entitled to two programming merit points.

E- and F- Channel Group Relocations. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, Maui and Seabury are not entitled to the one point for such applicants.

Total. Maui is entitled to a total of nine points: four points for being local; three points for being accredited; and two points for observing the four-channel limitation. Seabury is

[1] A "local" applicant is generally an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 F.C.C. 2d at 59; 47 C.F.R. §74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. §74.913(b)(4)

entitled to a total of 11 points: four points for being local; three points for being accredited; two points for observing the four-channel limitation; and two points for proposing an average of 42 hours of formal educational programming per channel per week. Thus the selectee is Seabury.

OTHER MATTERS

5. Seabury proposes to lease its excess capacity for non-ITFS use, as permitted by Section 74.931, and it has submitted a copy of its lease with Maui Cable Vision, a wireless cable operator. The lease conforms in all respects with the Commission's requirements. Additionally, no petitions to deny or informal objections have been filed against Seabury's application, and we find the applicant to be fully qualified.

6. Accordingly, IT IS ORDERED, That the application of Seabury Hall School (BPLIF-911008DL) IS GRANTED, and that the application of Maui Adventist School (BPLIF-910620DJ) IS DENIED.

7. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

WAYNE SCHOOL DISTRICT
Lindsay, OK — File No. BPLIF-911011DG

PAOLI PUBLIC SCHOOLS
Lindsay, OK — File No. BPLIF-920109DZ

For Construction Permit and License
in the Instructional
Television Fixed Service on
Channels C1, C2, C3, and C4

MEMORANDUM OPINION AND ORDER

Adopted: June 1, 1993; **Released: June 10, 1993**

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Wayne School District (Wayne) and Paoli Public Schools (Paoli), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels C1-C4 in the Lindsay, Oklahoma area.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of Wayne and Paoli. Both applicants are qualified to be ITFS licensees. Both are school systems accredited by the Oklahoma State Department of Education applying within their jurisdictions to provide ITFS service to their students.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been established. *Instructional Television Fixed Service - Second Report and Order in MM Docket 83-523 (Second Report and Order)*, 101 F.C.C. 2d 49, 65-72 (1985); 47 C.F.R. §74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, Wayne and Paoli are awarded points based on the following criteria:

Localism. Each applicant is entitled to four points for being a governmental entity serving the formal educational needs of schools within its respective jurisdiction.

Accreditation. Each applicant, accredited by the Oklahoma State Department of Education, is entitled to three points for accreditation.

Four-Channel Limitation. Neither Wayne nor Paoli is the licensee of, or has filed applications for additional ITFS channels in the Lindsay, Oklahoma area. Consequently, each is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid". Where the amounts and types of programming proposed in the schedule and in the grid are inconsistent, we shall consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of programming to be transmitted. *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992). Wayne's illustrative schedule proposes an average of 24.375 hours of ITFS programming per channel per week. However, the schedule does not indicate which programs are formal educational, as required by Section IV, Question 5 of the application. Accordingly, we will consider this programming as nonformal for the purpose of determining merit points. *Valley View Independent School District*, 7 FCC Rcd 7228 (1992). In contrast, its programming grid proposes an average of 4 hours of formal educational programming per channel per week. Because neither the schedule nor the grid establishes the threshold amount at which merit points are awarded, Wayne is entitled to no programming merit points.[3]

---

[1] A "local" applicant is an institution or organization that is physically located in the community, or metropolitan area, where service is proposed. *Second Report and Order*, 101 F.C.C. 2d at 59; 47 C.F.R. §74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of total ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. §74.913(b)(4).

[3] Even assuming the entry "4" signifies four hours per channel per day, or twenty hours per channel per week, the inconsis-

Paoli's illustrative schedule indicates an average of 25 hours of formal educational programming per channel per week, and its programming grid indicates the same. Thus, Paoli is deemed to have proposed an average of 25 hours of formal educational programming per channel per week, and is entitled to one programming merit point.

E- and F- Channel Group Relocation. Neither Wayne nor Paoli is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, neither is entitled to the one point for such applicants.

Total. Wayne is entitled to points for being local, for being accredited, and for observing the four-channel limitation, for a total of nine points. Paoli is entitled to points for being local, for being accredited, for proposing at least 21 hours of formal educational programming and for observing the four-channel limitation, for a total of 10 points. Thus, the selectee is Paoli.

OTHER MATTERS

5. Paoli proposes to lease its excess capacity for non-ITFS use as permitted by Section 74.931, and will submit a copy of its lease with Rural Electric Cooperative upon completion of negotiations. Accordingly, the authorization of Paoli will be conditioned upon submission of a lease agreement which complies with the Commission's Rules. *Rush Springs Public Schools,* FCC 92-580, released January 15, 1993. Additionally, there are no petitions to deny Paoli's application, and we find Paoli to be fully qualified and that a grant of Paoli's application will serve the public interest, convenience, and necessity.

6. Accordingly, IT IS ORDERED, That the application of Wayne School District (BPLIF-911011DG) IS DENIED, and the application of Paoli Public Schools (BPLIF-920109DZ) IS GRANTED, subject to the condition that within 30 days of the release of this Order Paoli submit to the Chief, Distribution Services Branch for approval information demonstrating compliance with Commission requirements, including, if appropriate, a copy of the lease agreement.

7. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

tency still warrants our awarding no merit points to Wayne. Since the grid does propose some formal educational programming, however, Wayne meets the basic programming requirements of Section 74.931(a) of our Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

MCFADDIN INDEPENDENT SCHOOL DISTRICT
Victoria, TX — File No. BPLIF-910820DF

BLOOMINGTON INDEPENDENT SCHOOL DISTRICT
Victoria, TX — File No. BPLIF-911113DE

For Construction Permit and License
in the Instructional Television Fixed
Service on Channels G1-G4

MEMORANDUM OPINION AND ORDER

Adopted: June 1, 1993; **Released: June 10, 1993**

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of McFaddin Independent School District (McFaddin) and Bloomington Independent School District (Bloomington) for a construction permit and license on Channels G1-G4 in the Instructional Television Fixed Service (ITFS). The applicants propose to serve Victoria, Texas.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded each applicant, we must first determine the basic eligibililty of each applicant. McFaddin and Bloomington are each qualified to be an ITFS licensee. Both are governmental organizations engaged in the formal education of enrolled students, which are accredited by the Texas Education Agency and are applying within their jurisdictions to provide ITFS service to their students. Consequently, both qualify as local applicants.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of 12 merit points based on five criteria deemed to be most relevant in predicting which applicant would be best qualified to provide the service for which the ITFS spectrum has been established. *ITFS Second Report and Order in MM Docket No. 83-523*, 101 FCC 2d 49, 65-72 (1985); 74 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions, or school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by that applicant of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of ITFS programming.[2] Fifth, one point is awarded to applicants which are existing Channel E or F licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, McFaddin and Bloomington are each awarded points based on the following criteria:

Localism. Both applicants are entitled to four points because they are school districts having one or more receive sites within their respective districts.

Accreditation. Both applicants are entitled to three points for being accredited by the Texas Education Agency.

Four-Channel Limitation. Neither of the applicants is the licensee of other ITFS facilities or is applying for additional channels in their local areas other than ones requested in the instant applications. Consequently, both applicants are entitled to two points for remaining within the four-channel limitation.

Amount of Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid". Where amounts and types of programming proposed in an applicant's schedule and grid are inconsistent, we will consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicants, so long as the excess capacity lease permits such a level of educational programming. *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992). McFaddin's illustrative schedule of programs proposes 20 hours of ITFS programming per channel per week. However, the schedule does not indicate which programs are formal educational, as required by Section IV, Question 5 of FCC Form 330. Accordingly,

[1] To be considered "local", an applicant must demonstrate that it is physically located in the community or metropolitan area where service is proposed. Additionally, an entity created by a state or local government for the purpose of serving formal educational needs is considered "local" throughout the area over which the entity's authority is intended to extend. *Second Report and Order, supra* at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

this programming will be considered as non-formal for the purpose of determining merit points. *Valley View Independent School District*, 7 FCC Rcd 7228 (1992). In contrast, McFaddin's program grid proposes four hours of formal educational programming per channel week. Because neither the amount of programming specified in the illustrative schedule or in the grid reach the threshold at which points are awarded, McFaddin is entitled to no programming merit points.

On April 17, 1992, the final opportunity for amendment of its application for comparative purposes, Bloomington amended its application to reflect changes in its illustrative schedule and its grid. As a result of those amendments, Bloomington proposes a per channel weekly average of 41 hours of formal educational programming on both its illustrative program schedule and on its programming grid. Further, the excess capacity lease permits such a level of programming. Bloomington is, therefore, entitled to two programming merit points.

E- and F-Channel Relocations. Neither of the applicants is the current licensee of E or F channels seeking to relocate to other channels. Consequently, this factor is inapplicable here.

5. McFaddin is entitled to points for being local, being accredited, and for observing the four-channel limitation, for a total of nine points. Bloomington is entitled to 11 points for being local, being accredited, observing the four-channel limitation, and proposing 41 hours of formal educational programming. Thus, the selectee is Bloomington.

OTHER MATTERS

6. Bloomington proposes to lease its excess capacity for non-ITFS use as permitted by Section 74.931, and has submitted a copy of its lease with United States Wireless Cable, Inc., which conforms in all respects with Commission requirements. Additionally, there are no petitions to deny Bloomington's application, and we find Bloomington to be fully qualified.

7. Accordingly, IT IS ORDERED, That the application of Bloomington Independent School District (BPLIF-911113DE) IS GRANTED, and the application of McFaddin Independent School District (BPLIF-910820DF) IS DENIED.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

EAST BERNARD INDEPENDENT SCHOOL DISTRICT
Chalmers, TX — File No. BPLIF-910613DF

BOLING INDEPENDENT SCHOOL DISTRICT
Wharton, TX — File No. BPLIF-911009DB

For Construction Permit and License in the Instructional Television Fixed Service on Channels G1, G2, G3, and G4

MEMORANDUM OPINION AND ORDER

Adopted: June 1, 1993; **Released: June 10, 1993**

By the Commission:

1. The Commission has before it for consideration the mutually exclusive applications of East Bernard Independent School District (East Bernard) and Boling Independent School District (Boling), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on channels G1-G4 in the Chalmers, Texas area.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of East Bernard and Boling. Both applicants are qualified to be ITFS licensees. They are governmental organizations engaged in the formal education of enrolled students, and they are accredited by the Texas Education Agency. Although they both propose to serve students outside their districts, because they also propose to serve schools within their own districts, they qualify as local applicants.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of 12 merit points based on five criteria deemed to be most relevant to selecting the applicant best qualified to provide the service for which the ITFS spectrum has been established. *Instructional Television Fixed Service - Second Report and Order in MM Docket 83-523 (Second Report and Order)*, 101 F.C.C. 2d 49, 65-72 (1985); 47 C.F.R. §74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, East Bernard and Boling are awarded points based on the following criteria:

Localism. Each applicant is entitled to four points for being a governmental entity serving the formal educational needs of schools within its respective jurisdiction.

Accreditation. Each applicant, accredited by the Texas Education Agency, is applying within its own jurisdiction. Therefore, each is entitled to three points for accreditation.

Four-Channel Limitation. Neither East Bernard nor Boling is the licensee of, or has filed applications for, additional ITFS channels in the Chalmers, Texas area. Consequently, each is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a programming schedule and a program "grid." Where amounts and types of programming proposed in the schedule and in the grid are inconsistent, we shall consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of programming to be transmitted. *Hispanic Information and Telecommunications Network, Inc.*, 7 F.C.C. Rcd 5924 (1992). East Bernard's illustrative schedule indicates an average of 24.375 hours of ITFS programming per channel per week. Because the schedule does not indicate which ITFS programs are formal, or those to be delivered to

[1] A "local" applicant generally is an institution or organization that is physically located in the community, or metropolitan area, where service is proposed. *Second Report and Order*, 101 F.C.C. 2d at 59; 47 C.F.R. §74.932, Note 1.

[2] One point is awarded for a proposed schedule of at least 21 average hours per channel per week of formal educational programming or of at least 41 average hours per channel per week of other ITFS programming. Two points are awarded for a proposed schedule of at least 41 average hours per channel per week of formal educational programming or at least 61 hours per channel per week of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. §74.913(b)(4).

enrolled students for credit, as requested in Question 5, Section IV of the application, we will consider the programming on East Bernard's schedule as nonformal for the purpose of determining merit points. *Valley View Independent School District,* 7 F.C.C. Rcd 7228 (1992). In contrast, its programming grid indicates an average of four hours of formal educational programming per channel per week.[3] Because neither the schedule nor the grid establishes the threshold at which points are awarded, East Bernard is entitled to no programming merit points.

Boling's amended illustrative schedule and programming grid, filed by the "B" cut-off date, propose an average of 41 hours of formal educational programming per channel per week. Accordingly, Boling is entitled to two programming merit points.

E- and F- Channel Group Relocation. Neither East Bernard nor Boling is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, neither is entitled to the one point for such applicants.

Total. East Bernard is entitled to points for being local, for being accredited, and for observing the four-channel limitation, for a total of nine points. Boling is entitled to points for being local, for being accredited, for observing the four-channel limitation, and for proposing an average of 41 hours of formal educational programming per channel per week, for a total of 11 points. Thus, the selectee is Boling.

OTHER MATTERS

5. Boling proposes to lease its excess capacity for non-ITFS use as permitted by Section 74.931, and has submitted a copy of its lease with United States Wire less Cable, Inc. (U.S. Wireless). Several of that lease'; provisions do not comply with the Commission's requirements for excess capacity leases. First, the lease provides for an initial term commencing with the first commercial transmission and continuing through the date five years prior to the expiration of Boling's license expiration date. Thereafter, the lessee, but not the ITFS licensee, is entitled to extend the agreement for up to five successive terms of five years, constituting, in effect, a term of 30 years. In addition, in the event Boling and U.S. Wireless are unable to reach agreement on additional renewals, the lease provides for the six-month continued leasing of the channels by U.S. Wireless beyond Boling's license term. These provisions are inconsistent with the Commission's maximum allowable term for excess capacity leases. *Instructional Television Fixed Service in Gen. Dockets 90-54, 80-113 - Report and Order,* 5 F.C.C. Rcd 6410, 6416 (1990). Second, although the lease provides for consultation with Boling regarding location of the transmitter site, another provision gives U.S. Wireless unilateral authority to change this site. We view this as inconsistent with the ITFS licensee's responsibility to ensure the adequacy of its service. *Second Report and Order,* 101 F.C.C. 2d at 90. Finally, the lease affords U.S. Wireless the right to select a prospective assignee of the ITFS license, which impermissibly intrudes upon that which has traditionally been the right of a licensee. *Id.* Although inconsistent with our requirements for excess capacity leases, these provisions neither reflect on the applicant's basic or comparative qualifications nor preclude grant of an authorization. *Van Vleck Independent School District,* 7 F.C.C. Rcd at 7233. Accordingly, Boling's authorization will be conditioned upon conformity of the lease to Commission requirements. Additionally, there are no petitions to deny Boling's application, and we find Boling to be fully qualified.

6. Accordingly, IT IS ORDERED, That the application of Boling Independent School District (BPLIF-911009DB) IS GRANTED, subject to the condition that within 30 days from the date of this Order, Boling Independent School District submits to the Chief, Distribution Services Branch for approval information demonstrating compliance with Commission requirements, including, if appropriate, an amended excess capacity lease conforming to the requirements discussed herein. The application of East Bernard Independent School District (BPLIF-910613DF) IS DENIED.

7. The staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[3] East Bernard amended its programming proposal on December 2, 1992, modifying the grid to indicate an average of 24.375 hours of formal programming per channel per week. Yet, because we consider the programming on East Bernard's schedule as nonformal for the purpose of determining merit points, the amended grid does not entitle East Bernard to any programming merit points. Further, East Bernard's lease agreement with a wireless cable operator provides for a total of 40 hours of formal programming, not the total average of 44.375 hours represented in the amended program grid (an average of 24.375 hours of proposed programming plus an average of 20 hours recapture per channel per week). Moreover, this amendment cannot be relied upon comparatively because any minor amendments resulting in a comparative advantage must be filed prior to the "B" cut-off date, which, in this case, was July 22, 1992. *Van Vleck Independent School District,* 7 F.C.C. Rcd 7231, 7232 n.5 (1992). However, East Bernard's original programming grid, which represents that there will be at least some formal educational programming, is sufficient to satisfy the programming requirements of Section 74.931(a).

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 10, 1993

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON THE TIME MACHINE, INC. FOR PETITION FOR DECLARATORY RULING

On April 29, 1993, The Time Machine, Inc. (TMI) filed a petition requesting that the Commission issue a ruling to preempt state regulation of interstate 800-access debit card telecommunications services. TMI states that it is seeking the ruling because many states are attempting to assert regulatory jurisdiction over purely incidental intrastate usage of 800-access debit card telecommunications services. TMI argues that preemption is necessary to prevent individual states from prohibiting or restricting access to TMI's integrated, nationwide system.

TMI states that it is a resale carrier that does not own or control any telecommunications or transport facilities. TMI states that it offers debit card services which provide customers with a simple and economical method to make pre-paid interstate long-distance calls. TMI states that debit card services are a new and rapidly growing component of the interstate communications marketplace. It argues that, although it offers an interstate service, state public utility commissions are attempting to regulate the incidental intrastate use of 800-access debit card services. In particular, TMI states that the "block or compensate" rules, rate regulation, and entry and certification requirements hinder TMI's ability to offer these innovative services to customers.

TMI states that because carriers cannot feasibly identify or monitor intrastate usage of 800-access debit services, TMI cannot rate and bill intrastate calls consistent with state standards. TMI states that the only practical way to comply with such state regulations would be to block all calls originating in a particular state which would include a large portion or interstate calls.

TMI states that, without preemption, 800-access debit services providers would be subject to all state regulations simultaneously, whether or not they offer service in each state. According to TMI, this type of universal certification requirement would place a substantial burden on TMI.

Interested parties are to file comments on this petition by **July 6, 1993**, and reply comments by **August 5, 1993**, with the Secretary, FCC 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition can be obtained from ITS, Inc. at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally,* 47 C.F.R. §§1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Commission Carrier Bureau, at (202) 632-1300.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amery Telephone Company

Glasford Telephone Company

Texas ALLTEL, Inc.

Requests for Waiver of
the Commission's Equal Access
Implementation Plan for
Independent Telephone Companies

MEMORANDUM OPINION AND ORDER

Adopted: May 27, 1993; Released: June 10, 1993

By the Chief, Policy and Program Planning Division:

1. In this order we grant three petitions for waiver of the Commission's equal access rules filed by independent telephone companies (ITCs). In the *ITC Equal Access Order*,[1] the Commission required ITCs to convert their end offices to equal access only if certain conditions were present. That order also established a timetable for conversion under those circumstances. Strict timetables for conversion had been imposed upon the Bell Operating Companies (BOCs) under the Modification of Final Judgment (MFJ),[2] and upon the GTE operating companies under the GTE Consent Decree.[3] The Commission recognized differences between the BOCs and ITCs with respect to the types of markets served, switching technologies employed, and financial resources available to undertake equal access conversion. Because of these differences, the Commission concluded that timetables of the type imposed upon the BOCs and the GTOCs would not be appropriate for the non-GTE ITCs.

2. Instead, the Commission required ITCs to convert end offices equipped with stored program controlled (SPC) switches within three years of a reasonable request for conversion to equal access by an interexchange carrier. The *ITC Equal Access Order* provided, however, that ITCs may seek a waiver of the Commission's rules if they "can demonstrate that such a timetable, or the provision of such access features, is not feasible except at costs that clearly outweigh potential benefits to users of telecommunications services."[4]

3. In this order, we consider the petitions for waiver of the equal access implementation requirements filed by Amery Telephone Company (Amery), Glasford Telephone Company (Glasford), and Texas ALLTEL, Inc. (ALLTEL). In March 1988, Amery and Glasford received requests for equal access conversion from the interexchange carrier MCI Telecommunications Corporation (MCI). On October 5, 1990, ALLTEL received a request for equal access conversion from MCI. Pursuant to the Commission's rules, the companies were required to complete equal access conversion within three years. The petitioners state that, for various reasons, they require additional time to implement equal access.

4. Amery states that it initially received a request for equal access conversion from MCI in March 1988. In May 1990, Amery filed with the Commission a petition for waiver seeking an eighteen-month extension of the Commission's equal access implementation requirements, stating that it was unable to complete its equal access conversion within three years due to equipment delivery delays. In January 1991, the Commission granted Amery's initial waiver request and Amery was required to complete its equal access conversion by September 1992.[5] On September 4, 1992, Amery filed a petition requesting an additional four months, until January 1993, to implement equal access, stating that a delay in obtaining the fiber optic equipment prevented it from completing the installation and testing of the system by September 1992. Amery has now completed its equal access conversion. In view of Amery's explanation, and the fact that Amery has completed its conversion, we grant the requested waiver.

5. On January 7, 1993, Glasford filed a petition seeking an extension of thirty-three months to convert its local exchange to equal access. Glasford states that, although MCI requested equal access service in March 1988, it was not aware of MCI's request until March of 1991, when MCI contacted Glasford to ascertain the progress of the equal access conversion. Glasford believes that it may have overlooked the MCI letter because there was a change in management at Glasford. Glasford also states that it was unaware of its obligation to comply with the March 1988 request. Glasford states that it discussed the issue with its counsel and that it now understands its obligation to implement equal access.

6. Glasford states that its existing switch is a Northern Telecom DMS-10 that lacks equal access capabilities. Glasford states that since learning of its obligation of implement equal access, it has been exploring the possibilities of upgrading the existing switch or replacing the switch. Glasford argues that the additional time, until December 1993, will allow it to have the necessary equipment delivered, installed, and tested.

7. On October 1, 1992, ALLTEL filed a petition for waiver seeking an additional eleven months to complete the conversion of its Anahuac end office to equal access. ALLTEL states that on October 5, 1990, MCI requested that ALLTEL convert its end offices to equal access.

---

[1] *MTS and WATS Market Structure*, CC Docket No. 78-72, Phase III Order, 100 FCC 2d 860 (1985) (*ITC Equal Access Order*).

[2] *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. *Maryland v. United States*, 460 U.S. 1001 (1983).

[3] *United States v. GTE Corp.*, 603 F. Supp. 730 (D.D.C. 1984).

[4] *ITC Equal Access Order*, 100 FCC 2d at 875, para. 50.

[5] *See In the Matter of C, C & S Telco, Inc., et al.*, Memorandum Opinion and Order, 6 FCC Rcd 547 (1991).

ALLTEL states that it will complete the equal access conversions for all but one of its end offices within three years of the request.

8. ALLTEL states that its Anahuac office has a digital NEC-61K not equipped with equal access capability, and it will cost approximately $300,000 to achieve equal access. According to ALLTEL, it is in the process of modernizing its entire network, which includes the total replacement of the Anahuac switch with a newly developed Northern Telecom Remote Switching Center (RSC). ALLTEL states that the new RSC will provide equal access not only in the Anahuac exchange but in five other exchanges not covered by MCI's request. ALLTEL states, however, that the new RSC will not be available from the manufacturer until the third quarter of 1994, approximately eleven months after the required conversion date of October 5, 1993. ALLTEL argues that a temporary waiver of eleven months, until September 30, 1994, will allow it to continue with its modernization plan without the added expense of upgrading the existing switch.

9. Based on our review of the record, we conclude that the requested waivers are in the public interest. The petitioners have set forth circumstances justifying their requests, and no one has opposed these waiver requests.[6] In addition, the interexchange carrier requesting equal access has not opposed the petitioners' proposed new completion dates for equal access conversion. We conclude that the companies have demonstrated that the timetables established by the Commission's rules are not feasible "except at costs that clearly outweigh potential benefits."[7]

10. Accordingly, IT IS ORDERED that the petitions for waiver of the equal access implementation requirements are GRANTED to the extent described herein.

FEDERAL COMMUNICATIONS COMMISSION

James D. Schlichting
Chief, Policy and Program
Planning Division
Common Carrier Bureau

[6] The United States Telephone Association filed comments supporting the waiver requests.
[7] *See ITC Equal Access Order* at para. 50.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 10, 1993

ALLTEL SERVICE CORPORATION PETITION FOR WAIVER OF THE DEFINITION OF STUDY AREA CONTAINED IN PART 36, SUBPART H, APPENDIX-GLOSSARY OF THE COMMISSION'S RULES (AAD 93-51)

Public Comment Invited

Comment date: June 25, 1993
Reply date: July 20, 1993

On May 20, 1993, Alltel Service Corporation (ALLTEL), on behalf of its affiliates, Alltel Pennsylvania Inc. (ALLTEL Pennsylvania), Brookville Telephone Company (Brookville), and Murraysville Telephone Company (Murraysville), filed a petition for waiver of the definition of "study area" as set forth in Subpart H, Appendix-Glossary of Part 36 of the Commission's rules. This waiver would allow the consolidation of the Brookville Telephone Company and Murraysville Telephone Company with Alltel Pennsylvania. The resulting company would continue to operate as an average schedule company.

Parties may file comments on this petition no later than **June 25, 1993**. Replies should be filed by **July 20, 1993**. Comments should reference AAD 93-51. A copy of each pleading should be sent to Patricia Shipley, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554, and to International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division's public reference room, 2000 L Street, N.W., Room 812, Washington D.C.; copies are also available from ITS.

For further information contact Patricia Shipley at (202) 632-7500.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 10, 1993

PETITION OF TIME WARNER ENTERTAINMENT COMPANY, L.P. AND US WEST COMMUNICATIONS, INC. FOR TEMPORARY WAIVER OF SECTION 63.54 OF THE COMMISSION'S RULES

On May 26, 1993 Time Warner Entertainment Company, L.P. (Time Warner Entertainment) and US West Communications, Inc. (US West) (Petitioners) filed a petition for a temporary waiver of Section 63.54 of the Commission's rules. Petitioners request a waiver for a period of eighteen months, to commence following the proposed acquisition of a limited partnership interest in Time Warner Entertainment by an affiliate of US West. Petitioners assert that the temporary waiver would allow Time Warner Entertainment the opportunity to cure, in an orderly fashion, the telephone company/cable television cross-ownership violation resulting from the US West acquisition.

Copies of the petition, and comments when filed, may be inspected and copied at the Commission's Reference Center, Room 239, 1919 M St., N.W., Washington, D.C. from 9:00 a.m. to 4:30 p.m. Copies are also available from ITS, INC., Room 246, 1919 M St., N.W. Washington, D.C. (202) 857-3800. Comments regarding the petition may be filed on or before **July 12, 1993**. Reply Comments are due by **August 11, 1993**. Comments should reference **DF-TW-01** and should be sent to: Donna R. Searcy, Secretary, Federal Communications Commission, 1919 M St., N.W., Washington, D.C. 20554. For general information on how to file comments, parties should contact the FCC Consumer Assistance and Information Division at (202) 632-7000. For further information contact Suzanne Hutchings (202) 634-1802.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-86

In re Applications of

GREAT LAKES BROADCASTING, INC.	File No. BPH-870327KA
HURON COMMUNICATIONS COMPANY Limited Partnership	File No. BPH-8703310B
NCB ENTERPRISES, INC.	File No. BPH-870410KC
LUIPOLD BROADCASTING, INC.	File No. BPH-870415MO

For Construction Permit for a
New FM Station on Channel 241A
Huron, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: May 13, 1993; Released: June 11, 1993

By the Commission: Commissioner Barrett dissenting with a separate statement.

1. Before the Commission are Applications for Review of 7 FCC Rcd 1829 (Rev. Bd. 1992) and of 7 FCC Rcd 6548 (Rev. Bd. 1992), in which the Review Board denied reconsideration of 7 FCC Rcd 1829. The pleadings were filed on November 9, 1992 by Great Lakes Broadcasting, Inc. (Great Lakes), NCB Enterprises, Inc. (NCB), and Huron Communications Company Limited Partnership (Huron).[1] Also before the Commission is an April 9, 1992 Contingent Application for Review of 7 FCC Rcd 1829 (Rev. Bd. 1992), filed by Luipold Broadcasting, Inc. (Luipold), to whom the Review Board granted the permit at issue in this proceeding.[2] [3] In considering the Applications for Review, we will also consider arguments made in the pleadings of two parties, NCB and Great Lakes, that a related Commission decision, 6 FCC Rcd 4331 (1991), must be reversed. In that decision we vacated an earlier Review Board decision remanding this case to Administrative Law Judge Joseph P. Gonzalez (ALJ) for a further hearing concerning whether Luipold had reasonable assurance of a transmitter site and whether Luipold falsely certified the availability of that site in its application.[4] For the reasons set forth below, we conclude that 6 FCC Rcd 4331 correctly vacated the Review Board's decision to remand the proceeding to the ALJ and we affirm the Board's subsequent decisions awarding the Huron, Ohio permit to Luipold.

2. As an initial matter, we address the arguments raised by Great Lakes and NCB that 6 FCC Rcd 4331 must be reversed and Luipold's application dismissed or, alternatively, that the proceeding must be remanded to consider Luipold's basic qualifications. We based our decision to vacate the Review Board's remand order on conclusions that the Petition to Enlarge issues against Luipold to include site availability and site certification questions was untimely and that the party filing the Petition had failed to meet one of the standards for acceptance of such late-filed pleadings; *i.e.*, it had not established a likelihood that the potentially disqualifying allegations would be proven.[5]

3. Great Lakes and NCB now contend that *David Ortiz Radio Corp. v. FCC*, 941 F. 2d 1253 (1991), decided approximately one month after our decision, mandates rever-

---

[1] Our action in this case was delayed slightly beyond the period prescribed by *Proposals to Reform the Commission's Comparative Hearings to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 164 ¶ 50 and n.33 (1991) for Commission action on applications for review in routine cases.

[2] Luipold filed the Contingent Application for Review for the sole purpose of arguing that the comparison between Luipold and Huron is not as close as the Review Board seemingly indicates because the Board erroneously disregarded a diversification demerit which the ALJ assessed against Huron. Since other parties sought reconsideration of 7 FCC Rcd 1829, action on Luipold's contingent Application for Review was deferred until this time.

[3] Responsive pleadings in this proceeding are numerous. On November 20, Great Lakes filed a Reply to the Applications for Review filed by the three other parties. NCB filed a Consolidated Response to the other parties' Applications for Review on November 24, 1992. Luipold filed separate Oppositions to NCB's and Great Lakes' Applications for Review on November 24, 1992. It also filed a Motion to Strike the Application for Review filed by Huron on the ground that Huron's pleading is in violation of 47 C.F.R. § 1.115(f)(1) (limiting the length of Applications for Review to ten pages). Huron filed an Opposition to the Motion to Strike on November 27, 1992. While we conclude that Huron's Application for Review is contrary to the spirit, if not the letter, of our rules because it appears to have met page limitation requirements only by using a reduced printing process, based on our disposition of this case, there is no prejudice to other parties to the proceeding. We will therefore dismiss Luipold's Motion. However, in so doing, we do not intend to signal that we will tolerate such manipulation of our regulations in the future. Finally, Huron filed a Partial Opposition to Great Lakes' Application for Review on November 23, 1992, a Motion for Extension of Time on November 27, 1992, and an Opposition to Luipold's Application for Review on November 29, 1992. The latter pleading was late-filed and Huron's Motion for Extension of Time contains no showing of good cause, but even if it had been timely filed, it would not have warranted any different resolution of this case. *See* n.19 *infra*.

[4] 5 FCC Rcd 7003 (Rev. Bd. 1990). We considered the Review Board's remand order in response to a Petition for Extraordinary Relief filed by Luipold on January 4, 1991.

[5] 6 FCC Rcd at 4331 ¶ ¶ 9-12.

sal of that decision.[6] NCB argues that *Ortiz* requires that, where assertions of lack of candor or misrepresentation are "sufficiently demonstrated," the Commission must examine them in a hearing even if the assertions are "grossly untimely." Even assuming that this analysis of *Ortiz* is accurate and the timeliness of the Petition to Enlarge against Luipold is thus not pertinent, the allegations made therein that Luipold's principal, Mrs. Luipold, intentionally deceived the Commission concerning site availability when she certified her proposed site were not sufficiently supported by factual allegations to mandate further hearings. While the record indicates conflicting interpretations as to the conversations of another Luipold principal with the site owner concerning use of the site by Luipold, there is no evidence disputing the testimony that that principal told Mrs. Luipold the site was available and no evidence that it was unreasonable for her to rely on his word in certifying that site. Moreover, once she learned that the site was unavailable, she promptly amended the application to specify a new site.[7]

4. The facts of this case are therefore unlike those of *Ortiz*. There the District of Columbia Circuit remanded to the Commission for hearings on the question of whether an applicant had deliberately concealed its post-application site problems because the applicant had not amended its application to specify a new site for seven months after learning that its original site was unavailable and because, during the seven months, it had submitted two filings to the Commission affirmatively representing that the original transmitter site was still valid. The Court believed that "these two filings met the standard of "suitable evidence of an intent to conceal.'"[8] No such evidence has been presented here, and therefore *Ortiz* does nothing to undermine our previous conclusion that the Petition to Enlarge against Leopold was properly denied.

5. NCB next argues that Luipold's application was deficient under *62 Broadcasting, Inc.*, 4 FCC Rcd 1768 (Rev. Bd. 1989), *rev. den.*, 5 FCC Rcd 830 (1990), which the Board cited in remanding this case to the ALJ. However, like *Ortiz*, *62 Broadcasting* is distinguishable from the instant case, and the Board erred in relying on it here. Specifically, in *62 Broadcasting*, the applicant admitted that her proposed site had never been available to her and therefore she did not have "reasonable assurance" of a site when she certified. Since the application was clearly accepted only on the basis of an admittedly false certification made for the purpose of complying with the filing deadline, the Board upheld the ALJ's conclusion that the application was "patently defective," could not be cured by subsequent amendment, and had to be denied.[9] Here, as stated, the record shows that Mrs. Luipold reasonably believed she had assurance of the proposed transmitter site when she certified, and the rationale of *62 Broadcasting* is therefore inapplicable. As explained in 6 FCC Rcd 4331, since Luipold subsequently learned that the site proposed was not available and filed an amendment to the application specifying a new site within thirty days of release of the Public Notice announcing acceptance for tender of the application, the amendment was filed as of right pursuant to 47 C.F.R. § 73.3522(a)(6) and mooted any deficiency concerning the original site.[10]

6. Finally, NCB contends that Luipold's application should have been dismissed because of a tenderability defect related to the plotting of its transmitter site on an engineering exhibit and two inconsistent narrative descriptions of the transmitter site location. NCB previously raised this argument before the ALJ in this proceeding, and we agree with his analysis and determination that the argument has no merit. *Memorandum Opinion and Order*, FCC 90M-543, released March 19, 1990. *See also* 50 Fed. Reg. 19936, 19946 Appendix D ¶ h (May 13, 1985) (when discrepancies in inconsistent information in an application can be resolved drawing on the application as a whole, the defect does not render the application insufficient for tender).

7. We turn now to allegations made by the other parties that, even if Luipold is basically qualified, it is not the comparatively superior applicant. The ALJ initially found Luipold superior based on conclusions that its proposal merited 100% integration credit and greater qualitative enhancement credits than did the proposals of Great Lakes and Huron, which also received 100% integration credit.[11] The Review Board affirmed.[12] Great Lakes and Huron now challenge again the award of 100% integration credit to Luipold. Their arguments on that matter have been raised, considered, and thoroughly addressed before,[13] and need not be discussed here.

8. Great Lakes and Huron further argue that, even assuming Luipold's proposal merits 100% integration credit, they are superior to Luipold. Great Lakes contends that it and Luipold are on "equal footing" except for one factor; Great Lakes is entitled to additional credit for its proposed move to the community of license, and should therefore be the preferred applicant. Contrary to Great Lakes' assertion,

---

[6] This argument was made in Great Lakes' and NCB's Petitions for Reconsideration filed before the Review Board, but the Board "dismissed [it] on a jurisdictional 'basis alone.'" 7 FCC Rcd at 6548 ¶ 3.

[7] Mrs. Luipold learned of the unavailability of the site on June 3, 1987, and specified a new site on June 22, 1987.

[8] The Court specifically noted that, had the applicant remained silent between the time that it was denied use of the site it originally proposed and when it identified a new site by amendment, "any charge of deliberate concealment might justly have been dismissed as 'speculation and surmise.'" *Id.* at 1259-60.

[9] 4 FCC Rcd at 1772 ¶ ¶ 25-27. The Board considered the engineering data in the original application as "entirely moot" and analogous to a situation in which no engineering information at all had been filed.

[10] *See* 6 FCC Rcd at 4332 ¶ 10.

[11] 5 FCC Rcd at 2925 ¶ 62. NCB received only 65% integration credit and has not challenged that decision; thus it is not entitled to further comparison.

[12] 7 FCC Rcd at 1832 ¶ 17.

[13] 5 FCC Rcd at 2925 ¶57; 7 FCC Rcd at 1830 ¶ 9.

the Review Board previously considered this argument and resolved it in Luipold's favor.[14] We agree with the Board's analysis.[15]

9. The Board also concluded that Luipold's enhancements under the unified residence/civic activities factor and for past broadcast experience outweigh Huron's enhancements for minority status and a promise to move to the community of license.[16] It should be clarified that, as Huron points out, the credit due Luipold under the unified factor is not "maximum" because Mrs. Luipold lives within the proposed station's service area, not within the actual community of license. However, the diminishment is very slight. *See Waters Broadcasting Corp.*, 91 FCC 2d 1260, 1262-63 (1982) (subsequent history omitted) (credit for residence and civic activities in the service area "closely follows" credit for residence and civic activities in the principal community); *see also* 7 FCC Rcd at 1830 ¶ 12. Thus the credit due Luipold under the unified factor is only marginally less than the credit due Huron for minority ownership. Huron's promise to move to the community of license is worth only slight credit and does little to increase any differential in qualitative enhancements that exists, especially in light of the fact that Luipold herself will continue to live in the service area.[17] *See Jerome Thomas Lamprecht*, 7 FCC Rcd 6794, 6795 ¶ 9 (1992) (claim of future residence in community of license accorded less weight than current service area residence). On the other hand, Luipold's credit for twenty years broadcast experience at stations in the service area, while also slight, is unmatched by any further credit due Huron.[18] [19] We conclude that it tips the balance in favor of Luipold's comparative superiority and supports the award of the permit to Luipold.[20]

10. ACCORDINGLY, IT IS ORDERED, That the Applications for Review filed November 9, 1992, by Great Lakes Broadcasting, Inc., NCB Enterprises, Inc., and Huron Communications Company Limited Partnership ARE DENIED.

11. IT IS FURTHER ORDERED That the Contingent Application for Review filed April 9, 1992, by Luipold Broadcasting, Inc. IS GRANTED to the extent indicated herein and otherwise IS DENIED.

12. IT IS FURTHER ORDERED That the Motion to Strike Application for Review filed November 24, 1992, by Luipold Broadcasting, Inc. IS DISMISSED.

13. IT IS FURTHER ORDERED That the Motion for Extension of Time filed November 27, 1992, by Huron Communications Company Limited Partnership IS DENIED.

---

[14] 7 FCC Rcd at 6549 ¶ ¶ 7-8. Specifically, the Board concluded that, because of Mrs. Luipold's longer local residence and more significant and diverse civic activities, the parties were *not* on an "equal footing" prior to factoring in the slight enhancement warranted by Great Lakes principal's promise of future residency. Furthermore, Luipold's advantage on the unified residence/civic activites factor was "not outweighed by [Great Lakes'] combined preferences." We also note that Luipold's application was, like Great Lakes' application, due some credit for future residence because of Mrs. Luipold's commitment to continue to reside in the service area. *See* Luipold (formerly Firelands) Hearing Exhibit No. 2, page 1.

[15] Great Lakes also attempts to argue that Luipold's credit for Mrs. Luipold's civic activities should be reduced because the activities did not involve positions of leadership and did not continue past 1987. It also claims that its principal has superior broadcast experience to that of Luipold's principal. However, Great Lakes failed to raise these contentions in Exceptions to the Initial Decision, and we see no public interest justification for considering them now for the first time. *See* 47 C.F.R. § 1.277(a) (party waives any objection to initial decision not saved by exception); 47 C.F.R. § 1.279 (Commission, in its discretion, may limit review of initial decision to those issues raised in exceptions).

[16] 7 FCC Rcd at 1831 ¶ 16; 7 FCC Rcd at 6549 ¶ 7.

[17] *See* note 13, *supra*.

[18] 5 FCC Rcd at 2925 ¶ 57; 7 FCC Rcd at 1831 ¶ 15. Huron argues here that Luipold's credit for past broadcast experience should be diminished because some of the experience was gained through part-time work. Huron did not file an Exception to the Initial Decision on this issue and we will not consider it here. *See* note 14, *supra*.

[19] 7 FCC Rcd at 6548 ¶ ¶ 5-6. Huron argues that its principal's past experience with an Ohio cable system also entitles it to credit for broadcast experience, but we agree with the Board that no such credit is due because Huron failed to meet the test established in *Ronald Sorenson*, 6 FCC Rcd 1952, 1953 ¶ 13 (1992) (enhancement credit for cable system experience due "to the extent that a cable operator actually presents programming responsive to local needs"). In response to the Board's conclusion, Huron has attached to its Application for Review a programming guide for the cable system with which its principal is involved. Even assuming that the one-page guide were enough to provide a basis for Huron's enhancement claim, it is not appropriate to consider on review newly introduced facts. *See* 47 C.F.R. § 1.115 (c) (applications for review may not rely on questions of fact on which the designated authority has had no opportunity to act).

[20] Given this conclusion, it is not decisional whether Huron is subject to a slight diversification demerit because its general partner and 70% equity owner is charged with a 50% ownership interest in a company that operates a cable system in Dayton, Ohio, of which he served as CEO and Chairman. 5 FCC Rcd at 2921 ¶ 24. However, we concur with the ALJ that Huron is subject to such a demerit, *id.* at 2925 ¶ 62, and that this demerit further diminishes, albeit slightly, the comparative standing of Huron. We have long recognized cable television interests as cognizable media interests for purposes of diversification, though we have traditionally considered them to be of less importance than broadcast interests. *Greater Wichita Telecasting, Inc.*, 55 RR 2d 926, 929 (1984). We note the Review Board's recent statements questioning whether, given the changed role of cable in the media marketplace, even that distinction is now valid. *Religious Broadcasting Network*, 3 FCC Rcd 4085, 4104 n.4 (Rev. Bd. 1988). Without deciding that question, we conclude that, in the instant case, the cable interest of Huron's principal is significant enough and the cable system itself both of sufficient size (serving approximately 975 subscribers) and proximity to the city of license of the proposed FM facility (within approximately 140 miles) to warrant a slight diversification demerit. *See Santee Cooper Broadcasting Co.*, 99 FCC Rcd 781, 795 ¶ 18 (Rev. Bd. 1984) (subsequent history omitted) ("onus" of comparative diversification demerit for 26.8% ownership interest in cable system serving 1000 subscribers and located approximately 60 miles from the proposed facility's city of license avoided on the basis of a timely divestiture pledge).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

DISSENTING STATEMENT OF COMMISSIONER ANDREW C. BARRETT

In Re: Applications of Great Lakes Broadcasting, Inc., Huron Communications Company, NCB Enterprise, and Luipold Broadcasting, Inc.

During my three and a half years on the Commission, I have not found it necessary to dissent in comparative hearing decisions. The facts of this case necessitate my issuing this statement registering my concern with the Commission backing away from its goals of increasing minority ownership. The Commission aided by the Congress stridently defended the minority preference policy in the United States Supreme Court.[1] We won that battle. The Court concluded that the award of a preference in comparative proceedings based on the goal of increasing minority ownership of broadcast stations was constitutional. Unfortunately, the goal we struggled so hard to defend before the Court is now being eroded in the comparative hearing process.

I fully recognize this case is a close call. I disagree with the fact that the Commission majority appears to go out of their way to award the license to Luipold Broadcasting, Inc. For the reasons stated below, I would have awarded the license to Huron Communications Company, Inc. -- the minority applicant.

First, in light of dearth of minority owners of broadcast stations, I believe the Commission should make every effort to ensure that minorities have an equal opportunity to be selected in comparative hearings. The parties in this proceeding are basically equal under the standard comparative factors. With the inclusion of a gender based preference which the commission no longer credits, the Administrative Law Judge determined that "[b]oth applicants, would stand, . . . on an equal footing."[2] Interestingly, a comparative hearing that was equal with a gender based preference became even stronger in Luipold's favor once that factor was eliminated from consideration. How the Review Board and the Commission majority could now determine that Luipold's comparative showing is superior mystifies logic.[3] The key to this decision appears to be the credit awarded for Luipold's past broadcast experience. But, the Commission even in 1965 recognized that this factor should not be accorded very much weight based on the disparate impact it would have on newcomers to broadcasting.[4] Here, the Commission majority not only gives Luipold a decisive advantage on this factor, it totally disregards the communications experience of Huron's principal.[5]

Second, the Commission majority has now determined that local residence, even if it is not in the community of license, and some civic activities is equal to the 100% minority ownership criterion. I disagree. The Commission majority admits the credit due Luipold is "not 'maximum'." Unfortunately, they failed to go the next step to recognize that credit due to Huron for minority ownership, and an intent to move to the community of license was superior to Luipold's credits. As stated earlier, very little credit should be awarded based on past broadcast experience. The past broadcast experience factor has the potential to preclude newcomers, including women and minorities. Given the state of both minority employment and ownership of stations in the broadcast industry, it is critical that the Commission not utilize these factors to also preclude the involvement of minorities in broadcast ownership. Accordingly, I dissent to the grant of a construction permit to Luipold in this case.

---

[1] *See Metro Broadcasting v. FCC*, 497 U.S. 547 (1990).

[2] *Great Lakes Broadcasting, Inc.*, 5 FCC Rcd 2919, 2925 (1990). The only difference was the fact the ALJ gave Huron a slight diversification demerit.

[3] If the award was based on a diversification demerit to Huron, I could perhaps have understood. I would still object to the analysis of the comparative factors, however.

[4] *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965).

[5] I understand the criteria is broadcast experience, but I believe that applicants should be allowed to fully demonstrate comparable experience, such as Huron's prinicpal's cable experience. It is not clear that Huron was given such an opportunity. In this regard, I also note that the majority cites the test established on *Ronald Sorenson*, 6 FCC Rcd 1952, 1953 ¶13 (1992). The *Sorenson* case was being decided almost parallel with the initial decision in this case. It is not clear that Huron was fully aware of what was required under this test or the fact that this credit was even needed in light of the ALJ decision. In any event, when presented an opportunity to provide evidence, Huron complied by submitting a progam, guide indicating programming "responsive to local needs."

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 93-79

In the Matter of

West Virginia Public Safety Plan

ORDER

Adopted: June 2, 1993; Released: June 11, 1993

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On January 21, 1993, Region 44 (West Virginia) submitted its Public Safety Plan to the Commission for review. The Plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in West Virginia.

2. The West Virginia Plan was placed on Public Notice for comments due on April 29, 1993, 58 FR 16408 (March 26, 1993). The Commission received no comments in this proceeding.

3. We have reviewed the Plan submitted for West Virginia and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in West Virginia.

4. Therefore, we accept the West Virginia Public Safety Radio Plan. Furthermore, licensing of the 821-824/866-869 MHz band in West Virginia may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Sherry Rullman File No. 12903-CM-P-83

For Authority to Construct and Operate
a Multichannel Multipoint Distribution
Service Station on the F-group
channels at Pocatello, Idaho

MEMORANDUM OPINION AND ORDER

Adopted: May 27, 1993; Released: June 11, 1993

By the Commission:

1. *Introduction.* Sherry Rullman (Rullman) filed an application for review of the determination by the Domestic Facilities Division (Division) on delegated authority that a second lottery was necessary for the Multichannel Multipoint Distribution Service (MMDS) applications for the F-group channels at Pocatello, Idaho, due to the inadvertent omission from the first lottery of a mutually-exclusive application filed by The Post Company. Rullman objects to the Division's decision that the list of applications entitled to be considered in the lottery must include each of the following applications: Warren F. Ache (File No. 77-CM-P-83), Joseph W. Hubbard (File No. 5933-CM-P-83), Sherry Rullman (File No. 12903-CM-P-83), and The Post Company (File No. 11833-CM-P-83). The Post Company filed an opposition to Rullman's application for review.

2. *Background.* Approximately five (5) weeks before the lottery date, the Commission released a *Lottery Notice,* Report No. MMDSL-18, Mimeo No. 1498 (Jan. 21, 1987), announcing that on a specified date, a lottery would be held for selection for qualification review between specified applications for the F-group channels at Pocatello, Idaho. This *Lottery Notice* specified that the Ache, Hubbard and Rullman applications were mutually-exclusive and would be included in this lottery. This *Lottery Notice* also stated: "All applicants are required to notify the Commission immediately of any errors in content or inadvertent omissions from these lists." Within a few days of the release of the *Lottery Notice,* counsel for The Post Company orally notified Division staff that its MMDS application, File No. 11833-CM-P-83, should have been listed as mutually exclusive with the above-referenced applications of Ache, Hubbard and Rullman and was entitled to be included in the Pocatello lottery for F-group applications. Division staff made an assessment that The Post Company's MMDS application was mutually-exclusive with the above-referenced Ache, Hubbard and Rullman MMDS applications, and indeed, was entitled to be included in the MMDS lottery. According to The Post Company's opposition, its counsel had numerous oral conversations, both in person and by telephone, prior to the lottery and was assured by Division staff that its application would be included in the lottery.

3. *Relottery Determination.* Despite The Post Company's notice, its MMDS application was not included in the lottery. By letter dated approximately two weeks after the lottery, the Division notified Ache, Hubbard, Rullman and The Post Company that the lottery was declared void and a second lottery would be held due to "[a]n oversight by the ... staff [which] caused an omission of an applica[tion] for the F group lottery for Pocatello, Idaho."

4. *Pleadings.* Within thirty (30) days of this relottery determination, Rullman filed an application for review of the Division decision to relottery the Pocatello F-group applications, with a certificate of service only to the Division Chief and The Post Company.[1] The Post Company argues that Rullman's application for review is procedurally defective, and should be denied, due to her failure to serve copies of her pleading on Ache and Hubbard as required by 47 C.F.R. Sec. 1.115(f).[2]

5. *Discussion.* Rullman's application for review will be dismissed for failure to comply with the requirements of 47 C.F.R. Sec. 1.115(c), which provides: "No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass." Rullman presented two questions of law and/or fact which the Division, as the designated authority which made the relottery decision, has not been afforded an opportunity to consider.[3] The proper procedure would have been for Rullman to file a petition for reconsideration with the Division. *See* 47 C.F.R. Sec. 1.106. Therefore, Rullman's application for review is dismissed as procedurally defective.[4]

6. *Service Defect.* Section 1.115(f) of the Commission's Rules provides, *inter alia:* "The application for review shall be served upon the parties to the proceeding." Ache and

[1] Rullman argues, without support, that The Post Company's oral notice to Division staff was insufficient and that written notice is required. She also argues that, according to 47 C.F.R. Sec. 21.901(d)(5), The Post Company's application was not entitled to be included in a lottery with the applications of Ache, Hubbard and Rullman. Rullman cites Section 21.901(5) as the appropriate rule provision. There is no Section 21.901(5). We have changed the reference to Section 21.901(d)(5) as the probable intent of Rullman.

[2] The Post Company also argues that 47 C.F.R. Sec. 21.31(a), not Sec. 21.901(d)(5), is controlling in this situation because Section 21.31(a) sets forth standards for mutual-exclusivity determinations when no metropolitan statistical area (MSA) is involved. The Post Company maintains its application is entitled to be included in the lottery because it satisfies the standards for mutual-exclusivity according to Section 21.31(a). Finally, The Post Company argues that it was not negligent in its method of notifying the Commission of the mutual-exclusivity error, and that it was not required to provide written notification.

[3] These two questions are: (1) whether Section 21.31(a) or Section 21.901(d)(5) applies to determining whether The Post Company's application is entitled to comparative consideration with other mutually-exclusive applications; and (2) whether The Post Company was required to provide written notification to the Commission staff of an error in a MMDS lottery notice.

[4] Because we have disposed of Rullman's application for review on procedural grounds, we need not reach the arguments raised by Rullman in her pleading.

Hubbard are parties to the proceeding because their applications are mutually-exclusive, and thus, are entitled to be included in the lottery. The Commission's disposition of Rullman's application for review will affect Ache's and Hubbard's interests. Ache and Hubbard were entitled to notice and an opportunity to be heard, either to support or oppose Rullman's application for review. The Commission has provided for such notice by requiring service by the applicant for review. Rullman failed to serve Ache and Hubbard, and thus, they were denied notice. Therefore, Rullman's application for review is also procedurally defective on these grounds.

7. *Conclusion.* Accordingly, the application for review filed by Sherry Rullman IS HEREBY DISMISSED as defective due to her failure to comply with the requirements of 47 C.F.R. Sec. 1.115(c) and for lack of service required by 47 C.F.R. Sec. 1.115(f). This order is issued pursuant to 47 C.F.R. Sec. 1.115, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 93-80

In the Matter of

Hawaii Public Safety Plan

ORDER

Adopted: June 2, 1993; Released: June 11, 1993

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On January 28, 1993, Region 11 (Hawaii) submitted its Public Safety Plan to the Commission for review. The Plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in Hawaii.

2. The Hawaii Plan was placed on Public Notice for comments due on April 29, 1993, 58 FR 16408 (March 26, 1993). The Commission received no comments in this proceeding.

3. We have reviewed the Plan submitted for Hawaii and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in Hawaii.

4. Therefore, we accept the Hawaii Public Safety Radio Plan. Furthermore, licensing of the 821-824/866-869 MHz band in Hawaii may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 93-77

In the Matter of

North Dakota Public Safety Plan

ORDER

Adopted: June 2, 1993; Released: June 11, 1993

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On January 13, 1993, Region 32 (North Dakota) submitted its Public Safety Plan to the Commission for review. The Plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in North Dakota.

2. The North Dakota Plan was placed on Public Notice for comments due on April 28, 1993, 58 FR 16192 (March 25, 1993). The Commission received no comments in this proceeding.

3. We have reviewed the Plan submitted for North Dakota and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in North Dakota.

4. Therefore, we accept the North Dakota Public Safety Radio Plan. Furthermore, licensing of the 821-824/866-869 MHz band in North Dakota may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 93-78

In the Matter of

South Carolina Public Safety Plan

ORDER

Adopted: June 2, 1993; Released: June 11, 1993

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On January 27, 1993, Region 37 (South Carolina) submitted its Public Safety Plan to the Commission for review. The Plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in South Carolina.

2. The South Carolina Plan was placed on Public Notice for comments due on April 28, 1993, 58 FR 16192 (March 25, 1993). The Commission received no comments in this proceeding.

3. We have reviewed the Plan submitted for South Carolina and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in South Carolina.

4. Therefore, we accept the South Carolina Public Safety Radio Plan. Furthermore, licensing of the 821-824/866-869 MHz band in South Carolina may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 92-273

In the Matter of

Wisconsin Public Safety Plan

ORDER

Adopted: June 2, 1993; Released: June 11, 1993

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On August 18, 1992, Region 45 (Wisconsin) submitted its Public Safety Plan to the Commission for review. The Plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in Wisconsin.

2. The Wisconsin Plan was placed on Public Notice for comments due on December 28, 1992, 7 FCC Rcd 7700 (1992). The Commission received one comment from Region 22 (Minnesota). The comment was subsequently withdrawn on May 10, 1993 and it was agreed that any frequency conflicts would be resolved on the local level.

3. We have reviewed the Plan submitted for Wisconsin and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in Wisconsin.

4. Therefore, we accept the Wisconsin Public Safety Radio Plan. Furthermore, licensing of the 821-824/866-869 MHz band in Wisconsin may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 93-86

In the Matter of

New Mexico Public Safety Plan

ORDER

Adopted: June 2, 1993; Released: June 11, 1993

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On February 2, 1993, Region 29 (New Mexico) submitted its Public Safety Plan to the Commission for review. The Plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in New Mexico.

2. The New Mexico Plan was placed on Public Notice for comments due on May 3, 1993, 58 FR 17399 (April 2, 1993). The Commission received no comments in this proceeding.

3. We have reviewed the Plan submitted for New Mexico and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in New Mexico.

4. Therefore, we accept the New Mexico Public Safety Radio Plan. Furthermore, licensing of the 821-824/866-869 MHz band in New Mexico may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

*U.S. Government Printing Office: 1993 — 342-145/60020